(23,273)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1912.

No. 698.

MARTIN PEDERSON, PLAINTIFF IN ERROR,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 29, 1912.

a *Transcript of Record.*

In the United States Circuit Court of Appeals for the Third Circuit, March Term, 1911.

No. —.

MARTIN PEDERSEN, Plaintiff in Error,
vs.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

1 April Session, 1910.

Bamberger, Levi & Mandel. 1068. James F. Campbell.		Martin Pedersen, a citizen of the State of New Jersey, vs. Delaware, Lackawanna & Western Railroad Company, a corporation created under the laws of the State of Pennsylvania.
1910, July	28.	Præcipe for Summons filed. Summons exit returnable the first Monday of August next.
" August	1.	Summons returned served and filed.
" "	2.	Order for the appearance of Jas. F. Campbell, Esq., for defendant.
" "	10.	Statement of Claim filed. Rule to plead filed.
" "	19.	Plea filed. Order to place case on Trial List filed.
1910, October	27.	And now, to wit, a jury being called come, to wit (see minutes).
" "	28.	And the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages at
2		Six Thousand one hundred and ninety ($6190.00) dollars.
" "	31.	Plaintiff's witness bill filed.
" November	1.	Motion for new trial filed. Motion for judgment non obstante veredicto filed.
" "	28.	Argued.
1911, January	18.	Opinion, McPherson, J., directing judgment to be entered in favor of defendant notwithstanding the verdict filed.

"	February	1.	Bill of Exceptions filed.
			Præcipe for judgment filed; judgment accordingly.
			Assignments of Error filed.
			Petition for Writ of Error filed.
			Order allowing Writ of Error filed.
"	"	9.	Bond sur Writ of Error filed.
			Order approving bond sur writ of Error filed.
			Writ of error allowed and copy thereof lodged in Clerk's office for adverse party.
			Citation allowed and issued.
"	"	10.	Citation returned "service accepted" and filed.
"	"	13.	Præcipe sur transcript of record sur writ of error filed.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judge of the Circuit Court of the United States for the Eastern District of Pennsylvania, Greeting:

3 Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you between Martin Pedersen, Plaintiff, and Delaware, Lackawanna & Western Railroad Company, Defendant, a manifest error hath happened, to the great damage of the said Martin Pedersen as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the 9th day of February, in the year of our Lord one thousand nine hundred and eleven.

[SEAL.] GEORGE BRODBECK,
Deputy Clerk of the Circuit Court of the United States.

Before McPherson, J.

Allowed—
BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

4 *Citation.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to Delaware, Lackawanna and Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court of the United States, Eastern District of Pennsylvania, wherein Martin Pedersen is Plaintiff in Error and you are defendant in Error to show cause, if any there be, why the judgment rendered against the said Plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John B. McPherson, Judge, holding Circuit Court of the United States this 9th day of February, in the year of our Lord one thousand nine hundred and eleven.

By THE COURT.

Attest:

GEORGE BRODBECK,
Deputy Clerk.

Service accepted.

JAMES F. CAMPBELL,
Attorney for Defendant in Error.

5 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1910.

No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Statement of Plaintiff's Claim.

Filed Aug. 10, 1910.

Plaintiff, Martin Pedersen, a citizen of the State of New Jersey, seeks to recover in the above action from the defendant, Delaware, Lackawanna and Western Railroad Company, a corporation created under the laws of the State of Pennsylvania, the sum of Fifty thousand dollars ($50,000.), amount due him upon a cause of action of which the following is a statement:

Plaintiff at the times herein mentioned resided and now resides in

the City of Hoboken, and is a citizen of the State of New Jersey. The above named defendant at the times herein mentioned was and now is a corporation created and existing under the laws of the State of Pennsylvania, having its office and principal place of business therein.

That at the times herein mentioned said defendant was a common carrier of passengers and goods and was engaged in commerce between several of the States of the United States of America,
6 including commerce between the States of New York, New Jersey, Pennsylvania and other States.

That this plaintiff was employed by the said defendant and was in the employ of the defendant *was* an ironworker and was working in and upon the erection and repair of certain railroad bridges for the said defendant on the 31st day of July, 1909, *or at* near the City of Hoboken, in the State of New Jersey, and was, on said date and at said place employed by the defendant in such commerce between the States as aforesaid.

That while this plaintiff was so engaged in said work on said day and while plaintiff was following the directions and orders of defendant in regard to said work and by such directions and orders was carrying a heavy load of tools for use in said work, this plaintiff was hit by a train of cars and a locomotive attached thereto, which train and locomotive were then being operated and propelled by the defendant, and which were then engaged in commerce between the States of the United States of America as aforesaid. That plaintiff was thrown down by said train and locomotive when hit as aforesaid and a portion of said train and locomotive struck and passed over the plaintiff, whereby he received great injuries and was made sick, lame and sore and was disabled and his body cut and bruised, and his left leg was severed from his body and cut off just below the knee, and his right foot was severed from his body and cut off, and plaintiff suffered great pain and anguish.

That said injuries were caused by reason of the negligence of the defendant and of its officers, agents and employees and by reason of defects and insufficiencies due to the defendant's negligence in its cars, engines, appliances, machinery, track, roadbed, works and equipment and by reason of the failure of the defendant and its officers, agents and employees to provide a safe place for this plaintiff to work in and to perform the work he was directed and
7 ordered to perform, as aforesaid, and by reason of the failure of said defendant and its officers, agents and employees to give warning to this plaintiff of the approach of said train and engine, and by reason of the failure of the employees of the defendant in charge of said train and engine to stop said train before hitting this plaintiff, and by reason of the failure of such employees to give any signal to this plaintiff of the approach of said train and engine, and by reason of the failure of defendant to properly equip said train and engine with emergency brakes, and other brakes, and by reason of the failure of said defendant to have said brakes in proper working order, and by reason of the orders and directions of the defendant's agents and employees in charge of the work of this plain-

tiff, given to this plaintiff to go in and upon the place where he was injured as aforesaid, without warning plaintiff of the danger of approaching trains.

Plaintiff further avers that the defendant's violation of the United States Statutes enacted for the safety of employees, and the provisions therein contained for their safety, contributed to the injuries of the plaintiff herein complained of, and which form the basis of the plaintiff's complaint against the defendant.

That the aforesaid injuries were received by this plaintiff without any fault or negligence on his part, but solely by reason of the negligence of the defendant, its officers, agents and employees, as aforesaid. That said injuries are permanent and they have totally disabled this plaintiff from earning his livelihood.

That by reason of the aforesaid this plaintiff has suffered loss and damage in the sum of Fifty Thousand Dollars ($50,000).

Wherefore plaintiff demands judgment against the defendant for the sum of Fifty Thousand Dollars ($50,000.) besides the costs and disbursements of this action.

BAMBERGER, LEVI & MANDEL,
Attorneys for Plaintiff.

8 STATE OF NEW YORK,
County of Kings, ss:

Martin Pedersen, being duly sworn according to law, deposes and says that he is the plaintiff in this action, and that the matters alleged in the foregoing statement of plaintiff's claim or demand as the basis thereof, are in all respects just and true.

MARTIN PEDERSEN.

Sworn and subscribed to before me this 4th day of August, A. D. 1910.

E. N. ROBER,
Notary Public, Kings County, 23.

STATE OF NEW YORK,
County of Kings, ss:

I, Henry P. Molloy, Clerk of the County of Kings, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That E. N. Rober, before whom the annexed deposition was taken, was, at the time of taking the same, a Notary Public of Kings County, dwelling in said County, duly appointed and sworn, and authorized to administer oaths to be used in any Court in said State, and for general purposes; that I am well acquainted with the handwriting of said Notary, and that his signature thereto is genuine, as I verily believe.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court and County, the 5 August, 1910.

[SEAL.] HENRY P. MALLOY, *Clerk.*

9 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1910.

No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
vs.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Plea.

Filed Aug. 19, 1910.

Defendant pleads "Not Guilty."

JAMES F. CAMPBELL,
Attorney for Defendant.

10 *Jury.*

And afterwards, to wit, on the 27th day of October, 1910, a jury being called, comes to wit:

Charles H. Pfisterer	A. P. Ringwalt
Albert Schoenhut	Preston M. Bastion
Charles E. Hopkin	Leon V. Brannen
James Rosenberger	Levinus Miller
Alex. H. Lane	T. F. Kreeger, Jr.
William W. Sullivan	Edward Greaves

who were respectfully sworn or affirmed to try the issue joined.

Verdict.

And afterwards, to wit, on the 28th day of October, 1910, the jurors aforesaid upon their oaths and affirmations respectively do say that they find for plaintiff and assess the damages in the sum of Six Thousand One Hundred and Ninety ($6,190.) Dollars.

11 In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1910.

No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Bill of Exceptions.

Be it remembered, that in the said Sessions of April, A. D. 1910, came the said plaintiff into the said Court, and impleaded the said

defendant in a certain plea of trespass, &c., in which the said plaintiff declared (prout narr.) and the said defendant pleaded (prout pleas). And thereupon issue was joined between them.

And afterwards, to wit, at a session of said court, held at the district aforesaid, before the Honorable John B. McPherson, of the said court, on the 27th and 28th days of October, A. D. 1910, the aforesaid issue between the said parties came to be tried by a jury of the said district for that purpose duly impaneled (prout list of jurors), at which day came as well the said plaintiff as the said defendant, by their respective attorneys; and the jurors of the jury aforesaid impaneled to try the said issue being also called, came and were then and there in due manner chosen and sworn or affirmed, to try the said issue; and upon the trial the counsel of the said plaintiff and of the said defendant did offer testimony as follows, to wit:

12 In the Circuit Court of the United States for the Eastern District of Pennsylvania, April Sessions, 1910.

No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

THURSDAY, *October 27th*, 1910.

Present:

Julius C. Levi, Esq., and Benjamin Patterson, Esq., for plaintiff.
James F. Campbell, Esq., for defendant.

Transcript of Testimony, Charge of the Court, and Exceptions.

Jury sworn October 27th, 1910.

Plaintiff's Evidence.

MARTIN PEDERSEN, having been duly sworn, was examined and testified as follows:

By Mr. LEVI:

Q. Where do you live?
A. Hoboken, New Jersey.
13 Q. You lived there in July, 1909?
A. Yes, sir.
Q. You were also a resident of Hoboken at the time of this accident that I have described to the jury, which took place on the 31st of July, 1909?
A. Yes, sir.
Q. Are you married?
A. Yes, sir.

Q. How old are you?
A. Thirty-eight years.
Q. How large a family have you?
A. I have a wife and one child, one boy eight years old.
Q. Were you in the employ, prior to the 31st of July, 1909, of the Delaware, Lackawanna and Western Railroad Company?
A. Yes, sir.
Q. When did you go to work for them?
A. The first of the month.
Q. The first of July?
A. Yes, sir.
Q. What employment did you get?
A. I was employed as an iron worker, bridge worker.
Q. In what particular work were you employed?
A. They were building a railroad bridge, the Lackawanna Railroad Company.
Q. They were building a railroad bridge where?
A. At West End. A couple of miles from Jersey City, West End.
Q. How long did you work there?
A. I was working there three weeks before I got hurt. We were living in Hoboken, and we went to the job every morning by train.
Q. In other words, you worked for the company three weeks before you were hurt?
A. Yes, sir.
Q. On the 31st of July, 1909, the day of this accident, you left your home in Hoboken, did you not?
14 A. Yes, sir.
Q. Did you go to work on that day for the Delaware, Lackawanna and Western Railroad Company?
A. Yes, sir.
Q. What was your work on that day?
A. In the morning at 7 or 8 o'clock we got orders from the foreman——
Q. Who was the foreman?
A. J. W. Campbell.
Q. Where did you report for work on the morning on the 31st of July, 1909?
A. At the new bridge they were putting up.
Q. Where was that bridge located—at Hoboken?
A. At West End, Hoboken.
Q. Campbell told you to go there did he. He was your foreman?
A. Yes, sir; he was the foreman.
Q. Where did you go then?
A. We came to the new bridge and we got orders from the foreman to make a box to separate the rivets, me and another fellow by the name of George.
Q. George who?
A. They called him George on the job. He is a German fellow, and his right name is George Conrad.
Q. How long were you working at that job separating the rivets?
A. Until dinner time.

Q. What did you do after that?

A. He gave us orders, the foreman, when we were finished with the job, to bring over a lot of screw bolts and rivets to the other bridge.

Q. How far away was that other bridge? Is that the bridge where the accident occurred?

A. Yes.

Q. What were you doing after he gave you those orders?

A. After dinner we took the bag and filled it with screw bolts, and rivets, and me and George took it to the tool car.

15 Q. You had to carry this bag to the tool car?

A. No. We went to the tool car and filled it up with screw bolts.

Q. Where was the tool car—how far away was the tool car from the bridge where the accident occurred?

Mr. CAMPBELL: I object. This is the second time Mr. Levi has interjected the phrase, "The bridge where the accident occurred." There is no evidence at all that there was an accident occurred on a bridge.

(Question withdrawn.)

By Mr. LEVI:

Q. What time of the day were you hurt?

A. Half past two o'clock.

Q. Where were you hurt? Before you tell us where you were hurt, what had you been doing just before you were hurt, and under whose orders were you acting?

A. I was doing the job on an order which I got from the foreman.

Q. What was that order?

A. To bring screw bolts up to the bridge where we were to work that night.

Q. Did you fill your bag with bolts and rivets?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. And did George do it, too?

A. Yes, sir.

Q. Were there a lot of other men working on that job besides you and George?

A. No

Q. I mean filling the bolts?

A. No. Only me.

Q. Only you and George?

A. Yes, sir.

Q. But working around the bridge and along that improvement were there a number of other men?

16 A. Yes.

Q. You filled the bag with bolts, rivets and screws?

A. Yes, sir.

Q. Where did you carry it to, or where did you try to carry it to?

A. We were going to take it to the bridge that we were going to

repair that night, where we had to take out a girder some distance away.

Q. Is that the place where you were hurt?

A. Yes, sir.

Q. I am going to ask you to tell what happened from the time you filled the bag with bolts, screws and rivets until you were hurt on the 31st day of July, 1909, just what you did.

A. We filled up our bags, and we each had our bag over our neck, and we were walking over to the other bridge. He was ahead of me.

Q. You mean George Conrad?

A. Yes, sir. And we came up on the track which comes over bridge, and we had to come up there to get up on the bridge. There were two tracks. We were walking to the bridge, and Conrad was ahead of me. Just as we were entering the bridge Conrad says: "Look out for the railroad", and I saw in my back a train coming from behind me. So I had to go away from that train and go on the east-bound track. A few moments after I was walking on the other track, when the other train came and hit me, and I didn't know anything of it, and I didn't know anything after that.

Q. Before that train hit you did you get any warning of any kind?

A. No, sir.

Q. Did you hear any bell sounded?

A. No, sir.

Q. Did you hear any whistle blown?

A. No. There was no whistle blown.

Q. Was there a man or a flagman stationed there, or anybody in the employ of the railroad company or otherwise, to give you
17 any warning of the approach of a train on the east-bound track—I mean the track where you were struck.

A. No sir. Nobody gave us any warning.

Q. Did you hear the whistle sounded or the bell rung of the train coming on the west-bound track that you avoided?

A. That was blowing a whistle before I went on the east-bound track.

Q. Did you hear from the time you went on the east-bound track to avoid the train on the west-bound track any whistle or any bell or any warning or any cry of any kind given by any one that a train was coming on the east-bound track?

A. No, sir; not except the man that said about the train coming west.

Q. Did you get any warning of the train coming east?

A. No, sir.

Q. Just before you were hit where were you walking?

A. I was on the bridge avoiding the train that was going on the west-bound track. The train was going east at the same moment I was under the engine. At the same moment I was under the engine the train was going west on the west track. Then the train stopped after he had passed over me with the engine, and I was cut badly up, so I didn't remember any more.

Q. Do you remember or can you describe that bridge? Was there any other way of getting to where you had to go?

A. No, sir; there wasn't any other route to go to the bridge.
Q. You had to go the way you went, did you?
A. Yes, sir.
Q. You were trying to get to the other side of the bridge to drop your load of bolts and rivets?

(Objected to as leading.)
(Question withdrawn.)

18 Q. Can you describe the bridge that you were on, how large it was and what it was over?
A. I haven't been up. That was the first time I was up on that bridge.
Q. Was there a foot-walk along the bridge or did you have to walk on the tracks?

(Objected to as leading.)
The COURT: I do not think that is leading. The question may be asked.
(Exception noted for defendant by direction of the Court.)

A. I had to walk on the tracks.

By Mr. LEVI:

Q. Is there any other place you could walk?
A. No, sir.
Q. What was below the bridge?
A. The street, and it was forty feet down there.
Q. If you would have stepped away from the tracks where you were walking what would you have stepped into and where would you have gone?
A. I would have fallen down and killed myself.
Q. You would have fallen into the street below, or whatever was there?
A. Yes, sir.
Q. This accident happened at what time in the day?
A. Saturday, the 31st of July, about three o'clock.
Q. That was the first day that you had worked at that particular bridge, was it?
A. Yes, sir; that was the first day.
Q. Before that time you were working at Jersey City?
A. I was working on the new bridge.
Q. How far away from that place?
A. That was eight hundred or a thousand yards away.
19 Q. After you were hurt, what is the next that you remember?
A. They picked me up. He got the train stopped when he passed over me with the engine and one car, as I remember, and they picked me up there and took me into one of the cars, and took me down to Hoboken to the hospital.
Q. How long were you in the hospital?
A. I was three months in the Hoboken Hospital, and then they sent me up to Scranton, the railroad company.

Q. The railroad company took care of you then at its own hospital in Scranton?
A. Yes, sir.
Q. While you were at Scranton you were under no expense?
A. No, sir.
Q. They paid the hospital bill?
A. Yes, sir. After seven months I came out, and it wasn't healed up.
Q. Before this accident happened you had both of your legs?
A. Yes, certainly.
Q. And as the result of this accident was the left leg cut off from the knee, below the knee?
A. Two inches below the knee.
Q. And as to your right leg, what did you lose there?
A. The foot close to the ankle.
Q. The foot was amputated close to the ankle?
A. Yes, sir.
Q. What were you earning at the time of this accident or while you were in the employ of the Delaware, Lackawanna and Western Railroad Company?
A. Three dollars a day.
Q. Three dollars a day every day you were at work?
A. Yes, sir.
Q. How much have you earned since the accident?
A. Not a cent.
Q. You have no means of support?
A. No, sir.
Q. Are you able by reason of your present condition to work at your old trade as an iron worker?
A. No, sir.
Q. You cannot do anything in connection with the trade that you learned?
A. No, sir.
Q. Where were you born?
A. In Norway.
Q. How long did you live in Hoboken?
A. A couple of years. It was more than that, more than three years.
Q. Before this accident happened had you ever walked over these tracks or over this bridge?
A. No, sir.
Q. Did you get any warning of any kind as to any danger, or any precautions you were to take in walking over that track or birdge, from any of the foremen, Campbell, Conrad or anybody?
A. No, sir.
Q. They simply told you what you have already described? Is that right? You acted under their orders without any other instructions?
A. Yes, sir. Only to work under the order of the foreman.
Q. Did the foreman tell you anything about the condition of the track, the road-bed, and any precautions you should take about crossing the bridge, going over the bridge?

A. No, sir.
Q. You followed Conrad?
A. I followed Conrad.
Q. How many feet ahead was he?
A. He was about fifteen yards or twenty yards.
Q. Have you any idea how long those tracks are over that
21 street, or where this happened, this open space—do you remember that? Is it about seventy feet or don't you know?
A. About that.
Q. Have you suffered any pain since you have left the hospital? Do you suffer now?
A. Yes, sir. I am suffering every day.
Q. Are you still under the care of a doctor?
A. Yes, sir.
Q. What is the name of that doctor?
A. He is in the Norwegian Hospital at Brooklyn.
Q. In other words, you go there for free treatment?
A. No. I have to pay myself.
Q. You pay that doctor?
A. Yes, sir.
Q. How much do you pay him?
A. Nine dollars a week. I have been there for three months.
Q. What is that doctor's name?
A. Dr. Ferry.
Q. Is he the doctor who is treating you?
A. Yes, sir. He took an operation on my leg.
Q. Since you left the Scranton Hospital?
A. Yes, sir.
Q. He performed an operation on your leg?
A. Yes, sir.
Q. What was that operation, if you can tell us? What did he do?
A. The leg wouldn't heal up, so he told me there was a rotten bone in there and he had to operate to get it out.
Q. Did he operate on it?
A. Yes, sir, he operated.
Q. You pay this doctor nine dollars a week?
A. Yes, sir; nine dollars a week.
Q. For how long have you been paying it?
A. Eleven weeks.
22 Q. Have you been paying other doctors for medicine outside of what the company gave you?
A. No; not except that doctor in Brooklyn. About one hundred dollars.
Q. It has cost you so far about one hundred dollars?
A. Yes, sir.
Q. Have you since this accident been free at any time from pain or suffering?
A. No, sir. Not for an hour. The foot is open yet, so I have to go to the hospital to get it cut off.
Q. Describe as well as you can, in your own words, just what pain or suffering you still have?

A. Oh, I suffer an awful lot in that right foot. Seven months after I was hurt I couldn't sleep in the night time. They had to put morphine in my breast so that I could sleep.

Q. Can you sleep now?

A. The head doctor said it was only the nerve, but it must be the bone.

Q. Can you sleep now?

A. A little.

Q. Since this accident have you fallen away in weight? Since this accident are you as heavy as you were in your body?

A. Yes; I have fallen down much. Very weak and all.

Q. Can you tell the jury how big a man you were before the accident, and how much you weighed?

A. I weighed 163 pounds before.

Q. You were a man weighing about 163 pounds?

A. Yes, sir.

Q. In good health?

A. Yes, sir; in good health.

Cross-examination.

By Mr. CAMPBELL:

Q. How long have you been in this country?

23 A. Three and a half years.

Q. Where did you work before this accident—that is, before you went with the Lackawanna people?

A. I was working on a fruit sailing vessel.

Q. What were you doing immediately before you went to the Lackawanna Railroad? Who were you working with right before you went to work with the Lackawanna Railroad Company?

A. I was a ship's carpenter aboard a steamboat.

Q. Did you ever work on a railroad before?

A. Some years ago in Norway.

Q. What were you doing then in Norway?

A. It was only labor work to make tracks and fill up ground.

Q. Were you walking along tracks where trains ran?

A. No, sir.

Q. How long had you been working at this West End improvement before the accident?

A. Three weeks or eighteen days.

Q. What were you doing before the eighteen days with the Lackawanna? Where were you working?

A. I was doing different kinds of work. Joiner work, iron work.

Q. On the railroad tracks somewhere?

A. Yes, sir.

Q. Near the tracks?

A. No.

Q. This West End improvement, I understand is at the west end of the Bergen tunnel, as the tunnel comes into Hoboken? Is that right?

A. Yes, sir.

Q. The particular work you were doing on July 31st was building a bridge over what they call the Susquehanna Railroad?

A. Yes, sir.

Q. What were you doing there in building that bridge? What was your actual work?

24 A. I was taking up iron and fitting it and screwing up floor beams.

Q. Were you working on top of the bridge or underneath, or alongside?

A. Sometimes on top, and sometimes in the middle and sometimes below.

Q. Were trains going over that bridge all the time?

A. That was a new bridge and there were no trains going over that.

Q. You had been working around that bridge for three weeks?

A. Yes, sir.

Q. How did the trains get into the Bergen tunnel, if they did not go over that bridge?

A. Not that new bridge, but the other bridge was eight hundred yards away. There was where the trains came in.

Q. Where were the railroad tracks upon which trains were passing over this Susquehanna Bridge?

A. That new bridge they were putting up, there was a big high cement wall, and they were putting a bridge over that.

Q. Could you see the trains going back and forth?

A. Yes; we saw Susquehanna trains passing on the other side.

Q. Could you see the trains on the Susquehanna Railroad going into the tunnel and out of the tunnel from where you were woking?

A. Yes, sir; they used the bell every time they passed and slowed their speed.

Q. About how many trains an hour were there going over that track?

A. I couldn't tell you.

Q. A good many, were there not?

A. Oh, yes.

Q. Something like four or five hundred trains a day came

25 on the Susquehanna tracks into and out of this Bergen tunnel?

(Objected to.)

(Objection overruled.)

A. There were a great many trains on the Lackawanna and I saw the Susquehanna trains passing there. I don't know how many trains.

Q. You saw trains going over all the time?

A. Oh, yes, sir.

Q. How many trains do you suppose you saw on the Lackawanna track alone?

A. Up on the Newark branch there were passing trains, but we were not working there.

Q. Would these trains that you saw on the Lackawanna pass over the bridge where you say you were hurt?

A. Sure, yes.

Q. You say on the morning of July 31st, your foreman, Joseph Campbell, asked you to go somewhere and take from a tool car some bolts, and then take them some distance away to a place where you were going to put up the bridge that night? Is that correct?

A. To put a new girder in a bridge that night.

Q. How far away did you have to go before you got to the tool car from your place of work?

A. From the new bridge to the tool car was not more than fifty yards.

Q. How far was it from the tool car to the bridge where you were going to put this girder in?

A. I think it was eight hundred yards.

Q. In going from the tool car just describe what you did. Did you walk along the tracks or on the tracks?

A. I was going over the open space before I came up on the tracks.

Q. Did you walk on the track all the way from the tool house?

The COURT: Is there a plan or photograph or anything of that kind here?

26 Mr. PATTERSON: We have a plan of the locus in quo that existed at the time of the accident. Of course, this improvement was going on, and now of course it is different. We have the witness here who made this sketch.

(Witness withdrawn for the present.)

JOSEPH CAMPBELL, having been duly sworn, was examined and testified as follows:

By Mr. LEVI:

Q. On July 31st, 1909, you were in the employ of the Delaware, Lackawanna and Western Railroad Company?

A. Yes, sir.

Q. Are you familiar with the place where this accident occurred?

A. Yes, sir.

Q. I hand you a plan. Is that your knowledge of the situation?

A. That is perfectly correct of the situation at that time.

By the COURT:

Q. Did you make that plan?

A. Yes, sir.

By Mr. LEVI:

Q. Describe what these upper marks are? Just describe the plan to the jury.

(Witness described the plan to the jury.)

Q. Was there anything between these tracks on the bridge?

A. Nothing.

Q. Was there any footway?

A. No. There was no footwork on this temporary bridge.

27 Q. Where is the bridge where he was sent to work to?

A. Right down here where the track goes straight again.

(Indicating on plan.) About nine hundred feet, I should judge,—I never measured it—from this James Avenue Bridge where he got hurt.

Cross-examination.

By Mr. CAMPBELL:

Q. Did you make this plan yourself?
A. Yes, sir.
Q. From any measurement?
A. Only from the measurement of the bridge. I put in the bridge.
Q. The other things are your own calculations?
A. Yes, sir.
Q. These lines are the two tracks?
A. Yes, sir.
Q. Was that in existence at the time of the accident?
A. No, sir. They are the temporary tracks.
Q. Was the bridge across that street?
A. No, sir. This bridge was torn out, and they were taking down the old abutments and building new ones.
Q. Was there a walk across there at that time?
A. No, sir. No one was expected to go across the temporary bridge.
Q. Couldn't they have gone down on the street?
A. They would have had to go down the bank to get to the street.
Q. They could have gone down?
A. Yes, sir; but they would have had to go in the lumber yard.
Q. Was there a lumber yard there?
A. Yes, sir.

Mr. LEVI: I offer the plan just identified by the witness in evidence.

28 Mr. CAMPBELL: I object to the plan being offered in evidence. I object to any plan not properly measured by an engineer, of course.

The COURT: It is a sketch, used to show the relative position of things. I suppose that is about all it professes to be.

MARTIN PEDERSEN resumed:

By Mr CAMPBELL:

Q. You said you were walking from the tool car over the railroad tracks to the Duffield Street end of the bridge, where you were going to put in a girder that night? Is that correct?
A. Yes, sir.
Q. Who was with you?
A. Conrad.
Q. Conrad was walking with you?
A. Yes, sir.
Q. Was he with you all the time?
A. Yes, sir. He was a partner with me that day, and at the time of the accident he was ahead of me.

Q. He was carrying bolts also, I suppose?
A. Yes, sir.
Q. Now, you say before you went onto the bridge over James Avenue or James Street, Conrad called your attention to a train by saying, "Look out for the train," did he?
A. He sang out, "Look out for the railroad."
Q. You knew that that meant to look out for a train?
A. Yes.
Q. Did you look back and see a train coming then?
A. Yes, sir. I saw back a train coming.
Q. Then you stepped off on the other track and walked right ahead?
29 A. Yes, sir.
Q. How soon afterwards were you struck? Didn't you say a moment or so?
A. A few moments.
Q. In a few moments you were struck?
A. Yes, sir; just a few moments.
Q. When you stepped from the west-bound track onto the east-bound track you had not reached the bridge, had you?
A. Yes, sir. I was on the bridge.
Q. You stepped from the west-bound track to the east-bound track on the bridge?
A. Yes.
Q. Didn't I understand you to say a little while ago that there was no way in which you could step between the tracks, that it was all open? I thought you said there was no way that you could step from track to track when you were on the bridge because there was an opening going down to the street below.
A. That moment I stepped away from the train there wasn't any open space. There was ground at that time, and I was walking a few steps further up on the bridge.
Q. You had not reached the bridge, then, when you stepped out of the way of the west-bound train? Is that right?
A. When I was struck I was on the bridge.
Q. When you stepped out of the way of the west-bound train you were not on that bridge yet, but you stepped over to the east side track and then walked for a moment or two and were struck by the train coming east? Is that right?
A. Yes, sir.
Q. And at that time you say you were on the bridge?
A. On the bridge, yes, sir.
Q. How far away from the bridge were you when you stepped over on the east-bound track?
30 A. It couldn't be many steps.
Q. You say you heard no signals?
A. No, I heard no signals.
Q. Could you have heard any signals, such as a bell or whistle, if any had been given from the locomotive?
A. I could have heard a bell. If there was any locomotive bell I could have heard it.

Q. Wouldn't the noise of the other train prevent you from hearing?

A. No. Not the bell.

Q. Would it prevent you from hearing a whistle?

A. Yes. I guess so. There was much noise when the other train was passing.

Q. You could not hear a whistle but you could hear a bell? Is that right?

A. I could hear a bell if there was any, but there wasn't. I didn't hear anything.

Q. Do you remember giving a statement in this matter at Hoboken on the 13th of August, right a couple of weeks after the accident?

A. Yes.

Q. Is that your signature. (Paper shown witness.)

A. That is my signature, yes, sir.

Q. Do you remember what statement you gave?

A. Yes. I remember that.

Q. Do you remember saying in this statement: "I did not hear this train coming, but the train coming from Hoboken was making a good deal of noise, and if the whistle on the train which struck me was blown I could not have heard it on account of the noise." Do you remember saying that?

A. Yes; I remember that. I couldn't have heard then.

Q. Now, do you mean to say that you could have heard a bell? Could you have heard a bell?

A. Yes. I asked the engineer, "Did you use the bell"——

31 Q. You say you could have heard a bell but you could not hear a whistle?

A. Yes.

Q. Isn't a whistle much louder than a bell?

A. The bell is louder.

Q. Did you hear any bell rung by the other train?

A. Every time a train passes it always used to slow speed and use a bell.

Q. How do you know that? Had you been at this particular place before?

A. Not that place, but other tracks, where the Susquehanna and Erie trains pass when I was working on the new bridge.

Q. You mean when you were working on the new bridge then the trains rang a bell and whistled?

A. Yes, sir.

Q. Before they crossed?

A. Yes, sir.

Q. Did you notice many trains passing upon this bridge over James Street while you were working up a little above?

A. I couldn't say. I don't know of many trains passing there.

Q. A good many trains were passing over that James Street Bridge all the time, weren't there, night and day?

A. I suppose so.

Q. You knew trains were to be expected there, did you not?
A. No.
Q. Didn't you work along this railroad track for over three weeks?
A. Well, there where we were working.
Q. When you passed from the west-bound track to the east-bound track did you look to see whether a train was coming?
A. I had a big load and I went ahead.
Q. Did you look?
32 A. Yes; I looked.
Q. Did you see a train?
A. No; I didn't see any train.
Q. Why didn't you see it?
A. I couldn't see it. It was just in a moment.
Q. In a moment it hit you?
A. It hit me.
Q. In a moment it hit you?
A. Yes, sir.
Q. You are sure of that, are you?
A. I am sure of it, yes.
Q. In a moment after you got upon this east-bound track the train hit you?
A. Yes, sir.

Redirect examination.

By Mr. LEVI:

Q. That statement that has been referred to, before you signed it was it read to you by anybody?
A. No, sir.
Q. Where were you when you signed it, and under what circumstances were you called upon to sign it?
A. I was lying in bed very sick in the hospital.
Q. Where were you?
A. In St. Mary's Hospital at Hoboken.
Q. Who came to see you?
A. There came a young fellow. I don't know him. He asked me where I was hurt, and what happened to me, and I told him just the same as I told here, that I was ordered to bring screw bolts up to that bridge, and we were walking over there and came up on the tracks——

Mr. CAMPBELL: I object to this. This is the same thing over again. It is not re-direct-examination.
The COURT: He is telling what he told the man who asked for the statement.

33 By Mr. CAMPBELL:

Q. Is this just exactly what you told the man who took your statement? Is that the idea?
A. Yes, sir; the same that I told him.

Mr. CAMPBELL: I object for this reason: Here is a man who says he was sick at the time he made a statement, which was taken con-

siderably over a year ago. Now he is trying to say word for word what the statement was.

The COURT: You examined him about the statement.

Mr. CAMPBELL: I examined him about the statement, but I object to the question that Mr. Levi put because he is simply bringing in a lot of re-hash. This is what he says he said to somebody.

The COURT: You brought in the statement. It is proper examination to show the circumstances under which the statement was given.

Mr. CAMPBELL: The only thing about that statement was that he said a certain thing about not being able to hear the train because a train was going the other way.

The COURT: Are you going to offer that statement in evidence?

Mr. CAMPBELL: I might. But then he can call this witness afterwards.

The COURT: That is the reason why he is aking the question, to save him from calling the witness later. If you are not going to offer the statement in evidence, it is one thing. If you are, I will save time by allowing this question to be asked while the witness is here. Are you going to offer the statement?

Mr. CAMPBELL: As far as I know now, I will.

34 The COURT: Very well. I will allow the witness to be asked now the circumstances under which the statement was made, in order to save time.

Mr. CAMPBELL: There is no objection to that, the circumstances, but not the whole story.

By Mr. LEVI:

Q. Just tell the circumstances under which that statement was given, what the man said to you.

A. I was sick, and I was lying in bed, and there came a fellow in one forenoon, and asked me where the accident happened, and I told him I was acting under orders by the foreman to carry screw bolts over to the bridge and we filled up the bags, and were walking over to the bridge, and when we got up on the tracks I see a train coming from Hoboken coming fast.

Mr. CAMPBELL: I renew my objection here. He is repeating something that he says he said. This is not the circumstances under which he gave the statement. I haven't the slightest idea that they have testimony as to his mental capacity and how he felt, and so on. But to give a rigmarole as to what he said about this accident at a certain time I do not think it is relevant.

The COURT: It is not rigmarole in any way, but at the same time it is not strictly competent at this stage.

By Mr. LEVI:

Q. I do not want you to tell everything that was said, but what induced you to talk to this man about the accident. What led up to your giving a story of the accident? What did he tell you, the man who said he was from the railroad company?

A. He didn't tell me that. He told me he was a newspaper man or something.

Q. He said he was a newspaper man?

A. No; he didn't say he was, but I thought so. He didn't
35 tell me that but he only said that I should give information of the accident to him. I told him just in a few words.

Q. Did he get you to sign that paper?

A. Yes, sir. He said I had to sign it.

Q. You had to sign it?

A. Yes, sir.

Q. Did he read it over to you before you signed it?

A. No, sir.

Recross-examination.

By Mr. CAMPBELL:

Q. Did you read it over?

A. No; I didn't read it over. I couldn't read it over.

Q. I ask you if this is what you told this man who came to you on August 13th, 1909——

(Objected to.)

(Objection withdrawn.)

Q. You say, that "On the 31st day of July 1909, I was working for Foreman Campbell for the D. L. and W. Company at the West End or Bergen Junction. I had been working on a bridge over a street. I am not familiar enough with the country to explain just where I was hurt, but I had gone across the tracks with a bag of screw bolts, and another man named George Conrad was along side of me, and I walked along the tracks about fifteen minutes past two o'clock in the afternoon. We were walking along the tracks running from Hoboken, and my partner says, 'Look out for the train,' and I stepped out of the way of the train coming from Hoboken and stepped over on the other track, and I walked to the middle of the track and walked along on that track when I was struck by a train going to Hoboken. This bag of screw bolts was very heavy
36 and I couldn't jump. The other man, George, was just a little ahead of me, and he got off the track before the train coming toward Hoboken came along. I didn't see this train at all until it struck me. I did not hear this train coming, but the train coming from Hoboken was making a great deal of noise, and if the whistle on the train which struck me was blown I couldn't have heard it on account of the noise." Isn't that exactly what you told this man?

A. Oh, yes.

JOSEPH CAMPBELL, heretofore sworn, was recalled and examined and testified as follows:

By Mr. LEVI:

Q. You have been sworn?

A. Yes, sir.

Q. What was your position or employment in July, 1909? With whom were you employed during July, 1909?

A. The D. L. & W. as bridge foreman.

Q. How long had you been working for the Delaware, Lackawanna & Western Railroad?

A. Eighteen years.

Q. Are you familiar with its system?

A. Yes, sir.

Q. Do you know what its business is? Does it carry freight, and is it engaged in the carriage of commerce?

A. Yes. It carries through freight from western points.

Q. Passing through what States?

A. The road passes through New York, Pennsylvania, and New Jersey.

Q. And all its connections pass through other States?

A. Yes, sir.

Q. You know that?

37 A. Yes, sir.

Q. During July 1909 what was your particular work that you were engaged in?

A. It was the elimination of the Susquehanna crossing at the west end of Bergen Tunnel.

Q. Did you have charge of any of the work in connection with what is known as the West End improvement?

A. Yes, sir. I handled the iron work there.

Q. What was that West End improvement that the railroad company was engaged in at that time?

A. They were raising the Delaware, Lackawanna & Western tracks to go over the Susquehanna tracks and doing away with the grade crossings and one street crossing.

Q. Doing away with grade and street crossings?

A. Yes, sir.

Q. Were you the foreman in charge of the particular work in which Mr. Martin Pedersen, the plaintiff, was engaged in?

A. Yes, sir.

Q. Did you employ him?

A. Yes, sir.

Q. Did you have the authority by the defendant company, the Delaware, Lackawanna & Western Road, to employ this man?

A. Yes, sir.

Q. And you employed other men?

A. Yes, sir.

Q. How many men were engaged in that work on July 31st, 1909?

A. I can't give it to you right down to the man. I should judge there were thirty-five or forty men under me.

Q. Was it part of their duties to cross and recross this temporary bridge that you have noted on this plan or sketch? (Referring to sketch offered in evidence, prepared by the witness.)

38 A. Yes. Whenever they went to work down at what is called Duffield Street.

Q. How could they approach that street, these different men?

A. Which street is that? James Avenue?

Q. Yes. You have heard Mr. Pedersen describe that he was obliged to take a bag of screws, bolts and rivets from a tool car, and then go over this temporary bridge and cross the bridge and work down there.

A. They had to cross the Susquehanna & Western tracks, and there is a "Y," and that is the bridge they generally took. That is the "Y" there. (Indicating on sketch.)

Q. That was the path generally taken?

A. Yes, sir.

Q. There was a path which could avoid the tracks through a lumber yard, was there not?

A. The railroad runs down through the lumber yard, and the Susquehanna & Western had a switch down through the lumber yard.

Q. Were your men allowed to go through the lumber yard, or was that way broken off?

A. The watchman told several of them to keep out of there.

Q. Then if they had been denied the right of passage through the lumber yard, could these men have taken any other route than the one he described?

A. Without going over to another street known as St. Paul's Avenue, about eight hundred feet away, and then going down the streets and back again.

Q. Away out of the road?

A. Yes, sir.

Q. Was this the path taken generally by the men employed on that work?

A. Yes, sir.

Q. That was the usual path?

A. Yes, sir.

Q. There was no other way to go at that time?

39 A. No; no other way to *do* at that time.

Q. Did the railroad company have any watchman or flagman at either side of this temporary bridge?

A. They had one at a place called West Side Avenue.

Q. How far away?

A. Three hundred feet, I judge, or maybe more. That was a road crossing.

Q. Did it have any man or any employee or any signal or warning for the men who were obliged to cross this temporary bridge?

A. The usual method was when they came on the new work, the slow order was to ring the engine bell. That was the usual order, and most of the engines did it.

Q. Was there an existing order—do you know—rule or regulation as to the running of trains in going over a temporary track or temporary bridge at that time, on July 31st?

A. There were notices posted that speeds shall be reduced to ten miles an hour.

Mr. CAMPBELL: I object to that and ask that it be stricken out.

By Mr. LEVI:

Q. Explain all you know about the rules and regulations.

A. There was a notice posted between these points, and they were signed by the superintendent, that the speed was to be reduced to ten miles an hour. There was also a circular letter sent to the foreman—that is, the engineer in charge of the job, and they were given to the foremen doing work there. I know I had one to that effect.

Q. What were they to do under this rule?

Mr. CAMPBELL: Does your Honor think it is relevant to describe some written notice that might have been sent out by somebody else not called as a witness?

40 The COURT: If he saw it and knows its contents, why not?

Mr. CAMPBELL: It seems to me the best evidence is the rule itself that was posted up.

The COURT: If the rules are accessible, yes; but it is not a written instrument, as a matter of course, in the sense that it is indispensable to have it.

Mr. CAMPBELL: The phraseology of notices is sometimes very peculiar. It applies to certain conditions. A man's recollection of what the contents of a circular is is certainly not very accurate, especially a year afterwards.

The COURT: We have to take it the best we can get it. If the rules are accessible, of course we would take them.

Mr. CAMPBELL: If he had made any call for it I probably could have had it here.

The COURT: They are not indispensable. The witness may give us his recollection about it.

Mr. CAMPBELL: I make a motion to strike out this testimony.

The COURT: The motion is overruled.

(Exception noted for defendant by direction of the Court.)

By Mr. LEVI:

Q. State just what that rule was as to the approach of trains and the manner of running and controlling them on this particular work?

A. I remember it pertained to the slowing down of trains to ten miles an hour on the new construction work and the elimination of the grade crossings at West End.

Q. What was the engineer to do in going over the work?

41 A. They usually whistle when they go on to the work and ring the bell going across. Whether that was the orders they had I couldn't tell you.

Q. They were the orders they had?

A. I couldn't tell you whether they were the strict orders or not, but the engineers had an order, I think. It was notified that the trains were going to be slowed down to ten miles an hour.

Q. In addition to that, all engineers in operating the trains in going over that new work—I mean the temporary track where the new work was being done—they rang their bell?

A. Most of them did. I couldn't say they all did, but most of them.

Mr. CAMPBELL: I object to that, and ask that it be stricken out.
The COURT: That question is grossly leading.
(Question withdrawn.)

By Mr. LEVI:

Q. Tell us what the engineers' duty was in operating the trains over the new work?

(Objected to as leading.)
The COURT: When a leading question like that is once answered, the mischief is done. He has testified to it, at all events.

By Mr. LEVI:

Q. The bridge that he was working on was what work?
A. That was what we called the Boonton Branch of the Delaware, Lackawanna & Western Railroad.
Q. Was Mr. Pedersen working that day on that particular job?
A. On the Boonton branch?
Q. On that bridge?
A. He was working at that particular time separating some rivets; him and a man named Conrad.
42 Q. What were they doing?
A. The rivets had been knocked out, and pins, and I told them to separate them in their different lengths, so they would be handled easier, for picking up a rivet, and after that they were to take these bolts *at* Duffield Street.
Q. That particular bridge that you have just spoken of, what was that intended for?
A. Which bridge? The Duffield Street?
Q. Yes.
A. They were adding another track to that to take care of what was known as the "Y." They were only operating as far as the east end, and they were putting a "Y" in to carry it down to Duffield Street.
Q. Come back to the other bridge that you have just described, where he had been working on the morning of July 31st.
A. That was to carry the Boonton Branch tracks over the Susquehanna Railroad where that ran over the new bridge. That was higher than the old bridge.
Q. What trains were to run over that bridge?
A. The trains that run over the bridge now, the freight trains——

(Objected to.)
Mr. LEVI: I simply want to show that it was for the passage of trains engaged in interstate commerce.
The COURT: You are not going to require proof on that point, are you?
Mr. CAMPBELL: I am willing to admit that any railroad in the

country is engaged in interstate commerce at times. It must be, and I could not imagine it would not be.

The COURT: Of course, this particular road is of an interstate commerce character?

43 Mr. CAMPBELL: This particular road, in some of its phases is, and there are branches of interstate commerce carried over it.

Mr. LEVI: And that this bridge and this work were part of the construction necessary to enable this road to discharge its business as an interstate carrier?

Mr. CAMPBELL: I admit that at some time in the future this bridge will be used for carrying commerce between the States.

Mr. LEVI: And was built for the very purpose of commerce going over that bridge between the States?

Mr. CAMPBELL: I won't admit that.

By Mr. LEVI:

Q. Do you know what that bridge was being built for?

A. That was built to carry the four tracks of the Boonton Branch.

Q. What trains run over the Boonton Branch?

A. There are through trains. The coal trains run over that, and also the passenger trains.

Q. Between what States?

A. Between Buffalo, New York. Some of the passenger trains run overe there.

Q. And that is in the State of New Jersey?

A. Yes, sir.

Q. And they went through New York, New Jersey and into what other State?

A. And through Pennsylvania and New York to Buffalo.

Q. What instructions did you give Mr. Pedersen on the morning of the 31st of July?

A. I told him and Conrad to separate the rivets, and then take the bolts—I gave Conrad the length of the bolts I needed, and the rivets—to Duffield Street. We were going to put in a girder—take out one and put in one early the next morning, starting at five o'clock.

44 Q. Were they to work on that girder?

A. They were to work the next day on that bridge.

Q. This was the preliminary work towards the work on that bridge, was it not?

A. Yes, sir.

Q. The repairing of that bridge?

A. Yes, sir.

Q. What was the bridge used for?

A. That bridge was known as the M. & E. Division of the Lackawanna Railroad.

Q. And do through trains pass over that railroad?

A. Yes, sir.

Q. Trains from where to where?

A. Buffalo to Hoboken.

Q. And from Hoboken to where?
A. To Buffalo.
Q. And through the different States?
A. Yes, sir.
Q. You stated that you gave Mr. Pedersen and Mr. Conrad the orders to carry screws or bolts and rivets from this tool car?
A. Yes, sir.
Q. Just state what orders you gave them, as near as you can recollect them.

The COURT: Please pass away from that.

By Mr. LEVI:

Q. What orders did you give him, if any, regarding any obstructions or dangers that he was to avoid?
A. I didn't give him any. I always told the men to look out. On this particular occasion I can't remember giving him any in that regard.
Q. Were your men allowed to go down the street which was eight hundred feet away in order to carry anything over there in connection with the work?
A. Not during working hours.
Q. They were not allowed to do it during working hours?
45 A. It would cost them their job to go out there. A man going out there, he is apt to be going for something else besides work. That was the trouble.
Q. What would happen to him?
A. He would be discharged if he could not give a good excuse of why he was going out there.
Q. You have described this sketch. This sketch represents the temporary tracks, does it not?
A. Yes, sir. The heavy lines.
Q. In order to cross this temporary bridge he was obliged to walk along the tracks to it? Is that right?
A. Yes, sir.
Q. Was there any footwalk along the temporary bridge?
A. No, sir.
Q. And in stepping from one track to another while on the bridge was there any other place for him to be except between the tracks on the other side that he was stepping into?
A. Between the rails. There was an opening of about three feet between the ties. He could step from one track to the other on the track, but there was no place to stand between the tracks. He would have to stand between the rails in this position, the rails in the path of the train.
Q. And if a train was coming on the west-bound track and he was stepping from that to the east-bound track, and another train was on the east-bound track, is there any way or place that he could step off to avoid the train on the other track without being hit?
A. No, sir. Unless he stepped into the street. That is the best he could do.
Q. Down how far below?

A. I should judge twenty feet. I can't tell just exactly how far it was.

Q. A train coming up on the east-bound track, there is a curve, is there not, some distance from the temporary bridge?

46 A. At that time there was a curve.

Q. A man walking on the east-bound track, could he see a train with a train on the west-bound track?

A. If he was on the bridge, I don't think he could.

Q. You do not think he could see on the bridge?

A. No. The curve would cut him out.

Q. And whichever way a man would step for the purpose of avoiding a train or two trains on that temporary bridge, he would be in peril of imminent danger? He would fall forty feet, or whatever the distance is?

A. If there was a train on the two tracks, he couldn't get off the bridge out of the way unless he stepped into the street. There was no way of escaping.

Q. Were there any flagmen or watchmen near that temporary bridge to warn any of the workmen of the approach of a train over that temporary bridge?

A. I don't think so. I never saw any there.

Q. You were there in charge of that work?

A. Yes, sir.

Q. And you never put one there?

A. No. Not except it was when tearing up a track, and then we always put somebody out.

Cross-examination.

By Mr. CAMPBELL:

Q. What is the distance across that bridge?

A. Seventy feet, about.

Q. Suppose a man stopped before he got to the bridge and saw a train coming. Was there any place of safety there?

A. Before he got to the bridge?

Q. Yes.

A. He could step down on the bank.

Q. What was the distance between the tracks?

A. Those tracks are about thirteen centres. He couldn't stand between the trains very handy.

47 Q. What distance would there be between the two passing trains?

A. A matter of a couple of feet or three feet.

Q. How wide is a car?

A. Ten feet four is the limit for the width of a car. All of them are not ten feet four.

Q. Did you ever see a car ten feet four in width?

A. I never measured one, but I have had the book of rules for the building of cars, and ten feet four is the limit. That is all I can tell you.

Q. Suppose there are two trains, then, ten feet four wide, what would be the distance between the two passing trains?

A. About thirteen feet centers. They would be about two feet ten inches.

Q. Are you sure of that? You are an engineer, are you not?

A. No, sir; I don't profess to be.

Q. Did you make this plan?

A. I made a rough sketch. That is all.

Q. I hand you a picture of this James Street bridge and ask you if that is your recollection as it was on that day, July 31st, 1909?

A. No. You have got girders in here that were not there. The abutments were not built at that time.

Q. I am not talking about the girders on the other side. I am asking you about this temporary track.

A. Yes; the temporary track.

Q. That is the same?

A. About the same, as near as I can figure it out.

Q. Is there any place for a man to stand before he reaches the bridge, then, and a place of safety, from the picture?

A. He could stand on the side of the track before he reached the bridge. If there was a train on the east-bound and there was a train on the west-bound track, he would have to step off down the bank.

Q. That could be very readily done, couldn't it?

48 A. Yes. He would have to go down the bank.

Q. Would he have to go all the way down the bank?

A. He could stop himself off before he got all the way down.

Q. Couldn't he sit right down there?

A. He might.

Q. Wouldn't you? What would you do if a train was coming down there? Would you go down the bank or get run over?

A. I would go down the bank, sure.

Q. There is no reason why Pedersen couldn't have done that?

A. If he was on the bridge, I don't see how he could.

Q. Before he got to the bridge we are talking about. About how many trains pass over that James Street bridge there every day?

A. I never kept count of them. I suppose during working hours there must be forty trains each way.

Q. Don't you know, as a matter of fact, that there were four or five hundred trains over there every day?

A. I am speaking about working hours. I don't know beyond that.

Q. What are your working hours?

A. Ten hours.

Q. You were in charge of these men, you say?

A. Yes, sir.

Q. You employed them?

A. Yes, sir.

Q. Did you tell them anything about the trains liable to be passing to and fro over that track where they were working?

A. No. I never told them anything about it. The trains were there to be seen.

Q. There was no reason for telling them, was there? Anybody could see the trains?

(Objected to.)
(Objection overruled.)

49 Q. There was no reason why you should tell them the fact that trains were going back and forth there? It was obvious, was it not?

A. Trains could be seen there plainly.

Q. Anybody could see them?

A. I suppose so.

Q. Anybody knows that if they stand in front of a train they would get run over?

A. They might.

Q. What was the reason that you did not give this man Pedersen warning that he might get hit by trains when they were coming carrying bolts down to this Duffield Street bridge?

A. I can't say that I warned them of it. I used to warn men to be careful.

Q. Why didn't you?

A. We don't warn a man every time he stirs about.

Q. You had warned them before, had you?

A. I was warning men in general to be careful.

Q. You did not think there was any necessity for warning them every time they went down the track or every time they went to work, did you?

The COURT: You need not prove that. Of course, there was no reason for that.

By Mr. CAMPBELL:

Q. Trains passed each other, did they not, upon that temporary railroad all the time?

A. Certainly.

Q. Trains going west and trains coming east were constantly passing?

A. Certainly.

Q. There was no reason why you should not expect one train to be passing upon the other track just because there was one upon the other, was there?

A. No. Trains pass there the same as any other place on the road.

50 Q. But you think they only went about ten miles an hour.

A. That is what the orders were, as near as I can recall, ten miles an hour. Some might run faster, and some slower.

Q. Had Pedersen been over that route before carrying bolts and things to Duffield Street?

A. I don't think he had. I cannot remember of his having been there before or having occasion to go there.

Q. The trains that would go over James Street bridge would pass where he was working at the West End, would they not?

A. No, sir. They would not pass on the Boonton Branch. They were not passing the Boonton Branch where he was working. After

they came over the James Street bridge they would not pass the place where he was working.

Q. Wouldn't the trains pass the James Street bridge below the point where he was working?

A. Not at the point where he was working.

Q. Could he see the trains where he was working?

A. He could, yes.

Q. No reason why he could not?

A. No; no reason why he could not see them.

Q. Do you remember making a statement in this case and signing it?

A. I don't remember.

Q. Is that your signature? (Paper shown witness.)

A. I think Mr. Roe called on me once. Yes; that is my signature.

MICHAEL KARNEY, having been duly sworn, was examined and testified as follows:

By Mr. LEVI:

Q. Where do you live?

51 A. Hoboken at the present time.

Q. On July 31st, 1909, where were you living?

A. On St. Paul's Avenue, Jersey City.

Q. What was your business then?

A. I was a foreman on the D. L. & W.

Q. On the Delaware, Lackawanna & Western Railroad?

A. Yes, sir.

Q. What were you in charge of—what particular work?

A. A gang of laborers.

Q. Where were you working on the 31st of July, 1909?

A. At the power house.

Q. How far is the power house from where the accident happened? You know where the accident to Pederson happened?

A. Yes, sir.

Q. How far away from where your gang of men were?

A. About three hundred yards.

Q. How far were you away at the time of this accident to Pederson?

A. About three hundred yards.

Q. Did you see a train go up on the west-bound track over the temporary bridge that has been referred to?

A. The train passed me about 2:15.

Q. Where did that train go?

A. It went to Buffalo.

Q. Did it pass over that temporary bridge?

A. Yes, sir.

Q. Did you hear a whistle blown on that train?

A. I heard No. 5 blow.

Q. Is that the train that you speak of?

A. Going west.

Q. That was the west-bound train?

A. Yes, sir.

52 Q. Was that going at a high rate of speed?

A. No. It was not going so awful quick.

Q. After that train passed where you were, did you see or hear a train approach on the east-bound track?

A. No, sir.

Q. Did you see the train where it struck the man after it stopped?

A. I saw it after it stopped, yes.

Q. Before the train stopped did you hear any whistle blown or bell sounded on that train?

A. Not on No. 5.

Q. That is, the east-bound train.

A. The west-bound train.

Q. Which of the trains that passed over that temporary bridge did you hear blow the whistle?

A. The west-bound train I heard blow.

Q. Did you hear the east-bound train, the one that hit Pedersen, ring the bell or blow any whistle?

A. No, sir.

Q. How do you know about that?

A. By the sound. By working around there you can tell by the sound of the different engines the different class of engines.

Q. Explain to the jury how you know that.

A. I was working around there about three months, and I could tell the different engines, the fast ones and the slow ones and the different sounds of the whistles.

Q. Were there different sized engines used to operate these different trains?

A. Yes, sir.

Q. What kind of an engine did they have on the east-bound train?

A. The east-bound train was a local, and they generally have a 900-class engine on that.

Q. What was the engine on the west-bound track? Was that a local, or what?

53 A. That was a 1000-class.

Q. A higher grade engine, is it not?

A. A heavier engine.

Q. What kind of a whistle is it? Have the whistles on those two trains different sounds?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. What kind of an engine was on train No. 130, that struck Pedersen that day?

A. It was a 900-class, a two-wheel connecter.

Q. Where did you say you were working on July 31st at the time of this accident?

A. Across from the power house.

Q. The power house is exactly where?
A. Right back of the signal tower.
Q. The signal tower, was that on James Street?
A. No. The signal tower was down towards the tunnel, east, about two blocks from James Street.
Q. Who were you working for at the time—the railroad?
A. Yes, sir.
Q. Was your statement taken?
A. No, sir.
Q. How far from the James Street bridge were you?
A. About three hundred yards.
Q. How did it come that you paid any attention to whistles that day?
A. I generally pay attention to whistles.
Q. How many trains went over that bridge at that time a day?
A. They run maybe every fifteen minutes.
Q. Do you know how the other whistles were that day? What other locomotives went through that day, and what kind of whistles did they have?
A. I don't know.
54 Q. You don't know?
A. No.
Q. How is it you remember these two whistles on these two trains about half past two that afternoon, then?
A. Because No. 5 was the only one of her class that went over that branch at that time of day, during the day time.
Q. Did you hear No. 5 whistle?
A. Yes, sir.
Q. When? Just before she left James Street or Duffield Street or West End, or where?
A. That I couldn't tell you. It was after she passed the Susquehanna crossing.
Q. Had she passed James Street at that time?
A. I don't know that.
Q. What was the number of the engine on No. 5?
A. That I couldn't tell you.
Q. How do you know that she belonged to a certain class, then?
A. A bigger engine and a longer train. I always looked at it.
Q. What sort of an engine was on 130 that day at that time?
A. It was one of those——
Q. Tell us what was there and how you know it?
A. I saw it.
Q. You saw it when?
A. After they put the man in the baggage car and passed on over the Susquehanna.
Q. What sort of a whistle did she have?
A. She had one of the 900-class engines.
Q. Did you ever hear it blow?
A. Yes, sir. I must have.
Q. Don't you know that that whistle is the same as the other?
A. Not the same as the 1000-class, no.

Q. How do you know?
55 A. I know by hearing the different sounds.
Q. When did you hear No. 5 and No. 130 together?
A. I don't suppose I ever heard the two of them together.
Q. Had you ever seen this locomotive before that was on 130?
A. I suppose I did.
Q. Can you tell us when and where?
A. On the D. L. & W. Railroad.
Q. Did you ever hear the whistle?
A. I can't say that I did, no.
Q. Did you ever hear this engine on No. 5 whistle?
A. I heard her that day.
Q. Did you see the locomotive?
A. Yes, sir.
Q. When?
A. That day.
Q. At what time?
A. Between two and half past two, when she passed on the west side there.
Q. What sort of an engine was it?
A. It belonged to the 1000-class.
Q. What was its number?
A. I don't know.
Q. Couldn't you see the number?
A. I didn't pay any particular attention.
Q. Why did you pay any particular attention to it on that day?
A. To the engine?
Q. Yes.
A. I always looked at it because it was a fast train.
Q. Had you ever seen it go through there before?
A. Yes, sir.
Q. Have you ever heard the whistle before?
A. Yes, sir.
Q. Did she whistle at James Street?
A. It most generally always whistled for the drawbridge.
56 Q. Did she generally whistle there for the James Street bridge?
A. She whistled around there for the drawbridge.
Q. And she whistled many times?
A. One long whistle, generally.
Q. That was for the drawbridge?
A. Yes, sir.
Q. Did you hear her whistle when she was passing over the James Street bridge?
A. I heard one long whistle that day.
Q. Where was she whistling? What was she whistling for at that time?
A. For the drawbridge, I suppose.
Q. Was she whistling for the drawbridge when you heard it on July 31st?
A. I should think she was, yes, sir.

Q. Was it a long blast?
A. Yes, sir.
Q. Did they have a peculiar signal for drawbridges?
A. No. Not that I know of. I am not very well acquainted with that.
Q. Was this a long whistle or a short one that you heard?
A. It was a long one.
Q. How soon afterwards did you learn there had been an accident and Pedersen was hurt?
A. It was not but a few minutes. I saw them all running up there, and I ran up as far as the Susquehanna crossing, and I stopped and didn't go any further.
Q. Where was train No. 130 then? How near the James Street bridge?
A. That I couldn't tell you. I didn't get close enough to it.
Q. Did you get close enough to see the locomotive?
A. Yes sir.
Q. Did you get close enough to tell what class she was?
57 A. No, sir; not there.
Q. Could you see the valves in her whistle?
A. No, sir.
Q. How do you know what kind of a whistle she had?
A. I didn't say I did.
Q. You do not know, then, whether it was 130 or No. 5 that whistled?
A. I am pretty positive it was No. 5.
Q. Why?
A. By the different sounds. A man gets accustomed to them by hearing them.
Q. Had you heard No. 5 whistle before?
A. Yes, sir.
Q. At that particular spot?
A. Somewhere around there.
Q. When had you heard No. 5 whistle—the day before?
A. Maybe not the day before. Maybe a couple of days before.
Q. Did you ever see an engine of that class pull a No. 5 train before?
A. Of that class?
Q. Of that class, yes.
A. What class do you mean—1000-class?
Q. 1000-class.
A. Yes, sir.
Q. I thought you said 1000-class was on train 130?
A. No, sir. I didn't say no such thing.
Q. What class was on 130?
A. 900-class.
Q. Which is the big engine?
A. 1000-class.
Q. That was on No. 5?
A. Yes, sir.
Q. How many cars were there on No. 130?

A. That I don't know.
Q. What cars were they?
A. Passenger cars.
58 Q. Were there any baggage cars on it?
A. It is customary to carry——
Q. Was there or was there not a baggage car there?
A. Yes, sir.
Q. How many cars were there?
A. Maybe about six. Five or six. I wouldn't say for sure how many.
Q. Did you run up the embankment to see this train 130?
A. I didn't have to run up the embankment.
Q. Where was she standing when you saw the men running towards her?
A. Up around James Avenue.
Q. To the east of James Avenue or west?
A. That I couldn't tell you. I suppose she was on the bridge there somewhere.
Q. Still on the bridge, or wasn't it?
A. That I don't know. I didn't see it.
Q. What did you see about it? Where was the locomotive standing with respect to James Avenue when you looked? Tell us.
A. It was standing around there. I was about 200 yards from it.
Q. How many yards from the James Street bridge—to the east or west?
A. The engine was 200 yards west of me.
Q. West of James Avenue?
A. No. I didn't say that.
Q. West of you?
A. West of me. I was at the Susquehanna crossing.
Q. You can tell what class engine there is 200 yards away? Is that the idea?
A. No, sir. She passed me afterwards.
Q. Do you know how far away the engine of No. 130 was from the James Street bridge when she stopped?
A. No, sir; I do not.

59 Redirect examination.

By Mr. LEVI:

Q. How long were you working there?
A. Three months.
Q. Was it customary for you to warn your men when a whistle blowed, to take care of themselves?

(Objected to as not re-direct-examination.)
The COURT: I do not see at present any connection.
(Question withdrawn.)

THEODORE CONRAD, having been duly sworn, was examined and testified as follows:

By Mr. LEVI:

Q. You were working for the Delaware, Lackawanna & Western Railroad Company on July 31st, 1909?

A. Yes, sir.

Q. You know Mr. Pedersen, the man who was hurt, the plaintiff here?

A. Yes, sir.

Q. Did he work with you on that day?

A. Yes, sir.

Q. Tell in your own way all that took place, so far as you and Pedersen were concerned, right up to the time of the accident.

A. I was working in the morning with Pedersen. I had orders from Mr. Campbell that morning to go and take Mr. Pedersen with me and build a box for sorting rivets in, to keep all the sizes separate. So we built the box, and about dinner time Mr. Campbell came to me and he told me, he says, "You take Mr. Pedersen along this afternoon and carry some bolts up." There were some
60 sizes, a couple of hundred—several sizes—for the bridge. After dinner we took a bag and started carrying up bolts.

Q. What bridge were you to carry the bolts to—these bolts and rivets? What did Mr. Campbell tell you about that?

A. To carry over the bolts on that bridge where they were to work the next day.

Q. Tell us everything that took place.

A. We took a load of bolts after dinner, and we left the tool car to go up there, and on the way going up Pedersen made a stop and took a drink of water, and I kept on going. So when I was coming on this bridge, on this James Avenue bridge, I looked around me and I saw the train coming, the west-bound train, and I turned around, and I hollered out, I says, "Look out for the railroad behind you." So then I walked down, and I passed this James Avenue bridge, and I was over the bridge, and I couldn't tell exactly—around a hundred feet; a little less or a little more I couldn't say—and then an east-bound train came, and he stopped so quick, and I saw people jumping to the windows and jumping off the train, and I threw my bolts off and turned around, and I saw Pedersen lying under the engine.

Q. Where was he lying?

A. He was lying right under the pony truck of the engine.

Q. Where—on the bridge?

A. On the bridge.

Q. Did you see the train before you got to the bridge, the east-bound train?

A. No. I saw him before he came on the bridge, I saw him when I was on the bridge, when I was up to the bridge.

Q. How far were you when you were on the bridge and saw that train—how far on the bridge were you?

A. I couldn't tell you exactly. I know I was on the bridge when I saw it.

61 Q. Had you crossed the bridge?

A. No; I was not across the bridge.

Q. You were ahead of Pedersen?

A. I was ahead of Pedersen.

Q. Did you notify Pedersen that a train was coming?

A. Not about that train.

Q. When the east-bound train was coming, and before it came, and before you saw it, did you hear it blow any whistle or ring any bell?

A. I heard a whistle blown. I couldn't swear now from which side it was coming, if it was coming from the west-bound or from the east-bound. I heard a whistle blow.

Q. Do I understand you to say that you could not tell, from where you stood, whether the engine on the east-bound track or the engine on the west-bound track blew the whistle? You heard one whistle for two trains? Is that it?

A. I heard one whistle, yes. I don't know which blew.

Q. But you do not know which engine blew the whistle, do you.

A. No.

Q. Did you hear any bell rung?

A. No, I did not.

Q. Was there any watchman or any flagman near this bridge to warn you of a train coming in either direction before you stepped on it?

A. No, sir.

Q. If you were on the temporary bridge, when you went from one track to the other, was there any foot-walk on that temporary bridge?

A. No, sir.

Q. You were not the foreman over Pedersen, were you? You were working with him?

A. No; I was not the foreman.

Q. Who was your foreman?

62 A. Mr. Campbell was my foreman.

Q. And a number of workmen had to cross this temporary bridge?

A. Yes, sir.

Cross-examination.

By Mr. CAMPBELL:

Q. Did you make a statement of this accident shortly after it?

A. I think I did.

Q. Look at that and tell me if that is your signature? (Paper shown witness.)

A. That is my signature.

Q. And is that your signature? (Paper shown witness.)

A. I think it is. I am not quite sure.

Q. This statement was signed by you, and I ask you if you recollect the statement as you told it on that day. It is this: "On July

31st, 1909, I was working under J. W. Campbell at the west end of the Bergen tunnel on the elimination of the Susquehanna grade crossing. About 2 p. m. Mr. Campbell told Pedersen and myself to carry bolts from the tool car which stood near the Susquehanna crossing on the Boonton Branch to Duffield Street. That is, Campbell told us about ten a. m. to do this, when we got done the job we were on then. It was about 2 p. m. when we started to carry these bolts. Pedersen and I went to the car and got a load of bolts apiece and left the car together. We walked over to the Newark Branch, and when we got to the west abutment of the Susquehanna on the Newark Branch, Pedersen stopped and got a drink of water and I walked on ahead of him about five hundred feet as my load was getting heavy. Just before I got across James Avenue bridge I turned around and shouted to Pedersen to look out for the west-
bound train which was coming up behind me. I didn't see
63 any east-bound train then. When I shouted at Pedersen he got off the track on the north side, not between the tracks, but clear of them on the north side. When I saw he was safe I walked on. Then just as I got across the James Street bridge, I saw the east-bound train, No. 130, coming. I was between the tracks at this time and I had all I could do to get off the tracks and let the two trains go by. So I looked around at Pedersen again. I saw the east-bound train stop, and then I dropped my bolts and went back, and then I found Pedersen had been struck. I didn't see Pedersen struck. The last time I saw him two minutes before he was struck he was off both tracks and in a place of safety. I do not know how he got back in the track so as to be hit. I heard these trains whistle and their bells ring. I have worked for Mr. Campbell for five years. Mr. Campbell told Pedersen and me to be careful of the trains and not get hit. Mr. Pedersen had worked on this job for sixteen days and was familiar with the situation. I had been over the same ground with him before. He was in good health and not at all deaf or blind. I did not notice anybody around where Pedersen was struck, and I know of no one who saw the accident. I was four or five hundred feet from him when he was hit, and I was looking the opposite way, because I had a bag of bolts on my back and I had to watch out for myself. The weather was clear, and he could have seen 130 to 300 feet, as there is no road crossing near the place where Pedersen was struck and no regular crossing for the workmen?

Do you remember giving that statement upwards of a year ago?

A. I remember that I never told that man Pedersen was with me there before. I never did.

Q. You remember all the rest of it?

A. Because I could not. Pedersen never was there with me before.

Q. Do you remember the rest of it? Is the rest of it true?

64 A. When I hollered for Pedersen about the railroad, "Look out for the railroad", yes, he stepped out to the north side of the track and was safe so far as I know, and when he crossed the track again I didn't notice. I didn't look after him.

Q. When you shouted for him to look out for the west-bound train he stepped on the north side to a place of safety?
A. Yes, sir.
Q. He was all right then?
A. Yes, sir.
Q. Then what did he do?
A. I walked away.
Q. Where were you at the time of the accident? Were you west of James Street bridge or east?
A. I was west.
Q. How far west?
A. I could not say exactly. Maybe a hundred feet or a little less or a little more.
Q. How far was Pedersen behind you?
A. I didn't look after Pedersen, not before the train stopped.
Q. Had he gotten to the James Street bridge when you looked back and he was in this place of safety?
A. No.
Q. How far was he from the James Street bridge then?
A. About 150 feet.
Q. When he was hit where was he on the track—east of the James Street bridge or west? When you ran up after the accident where was Pedersen—on the bridge?
A. On the bridge.
Q. Or on the other side of it?
A. He was pretty near across the bridge.
Q. What sort of a bridge was this? Did it have a walk across?
65 A. No, sir.
Q. How did you have to go across—on the ties?
A. Had to go on the ties.
Q. How wide is this bridge?
A. It is only one tie wide. There are two tracks, and there is an open space between the two tracks.
Q. How long a time do you suppose it was after Pedersen was standing north of the tracks that he was hit by the train? Do you remember that?
A. No.
Q. Where was No. 5 train when you called back to him that it was coming? Was it close to him?
A. He was maybe about 200 yards behind me when I hollered to him.
Q. And you saw him then step to the north of the track?
A. Yes.
Q. To let No. 5 go by?
A. He had plenty of time to cross the track again, the train was so far away from him.
Q. You did not see him cross back to get on the east-bound track?
A. No, I did not.
Q. The west-bound track is to the north, of course, is it not?
A. Yes, sir.

Q. The east-bound track is to the south?

A. Yes, sir.

Q. And you saw him step north, and he was safe then, and at that time the train was how many yards away from him—two hundred or three hundred yards from him?

A. The man never was there before, and he had to go with me, and he didn't know the way, and he didn't know where to go. That is the reason the man crossed the bridge again to catch up to me, so he would know where he had to go.

Q. Had you been there before?

66 A. Oh, yes.

Q. Doing what—the same kind of work?

A. Yes, sir.

Q. Carrying bolts?

A. Yes, sir.

Q. You knew trains went up there, did you not?

A. Well, yes.

Q. How many trains a day would you see there?

A. I couldn't tell you exactly. On Saturday there is a great many more—you can take a double amount.

Q. Was this on Saturday?

A. Yes, sir; this was on Saturday.

Q. There were lots of trains?

A. Yes, sir.

Q. The fact that there was a trestle or a bridge over James Street you could see, could you not, when you got to it? You could see there was a trestle and the street below when you got to that bridge, could you not?

A. You could see through the bridge.

Q. When you got to the bridge you could look down to the street, could you not?

A. No. You could look down to the street, but you could not get down to the street.

Q. Couldn't you go down the embankment?

A. Yes. Before you got on the bridge you could go down the bank.

Q. Suppose you stopped before you came to the bridge, wasn't there a place where you could stand and let trains go by?

A. Before you got to the bridge?

Q. Yes.

A. He would have to go down the bank.

Q. Is that a picture of the James Street bridge at that time? (Photograph handed witness.)

A. That looks like it.

Q. What is the distance between the tracks there, the inner rail of the east and the west-bound tracks—do you know?

67 A. I couldn't tell you exactly.

Q. Was there plenty of room to stand between the tracks and let trains go by?

A. A thin man can stand between. I stood between, I know that.

Q. There is plenty of room, is there not?
A. There is not plenty of room. You run the risk.
Q. Do you know how wide a car is?
A. No.
Q. Where did you stand to let this train go by after you got over the James Street Bridge—you stood on the track or the middle or where?
A. Over the James Street bridge.
Q. Was there any better place on that side of the bridge to stand than over where Pedersen was on the east side of the bridge?
A. Yes. There was plenty more room.
Q. But there was plenty of room for Pedersen to stand where he first sat down on the east side of the track?
A. If he went down the bank, yes.
Q. How long had Pedersen been working with you?
A. That was the only day.
Q. Had he been working with you the day before?
A. No, sir; not that I know of.
Q. Hadn't you seen him ever before?
A. Oh, yes. I have seen him working. He worked on the same place, on the same bridge with me, but didn't work with me. There are two men for bolts, two men making rivets, and there are four men together.
Q. You say you walked over that bridge before?
A. No. He never walked with me.
Q. Hadn't you been working on this West End Improvement for a month or so?
A. Yes.
68 Q. How long was Pedersen working there?
A. I couldn't say exactly. Maybe two weeks or three weeks.
Q. You saw him almost every day?
A. Yes, sir.
Q. You and he had the same kind of work?
A. No. Sometimes. Sometimes he ought to get the bolts together, and sometimes he ought to carry bolts.
Q. Yet you and he were working right there where trains were going by all the time?
A. Yes, sir. We worked together on the Boonton Branch.

Redirect examination.

By Mr. LEVI:

Q. Who are you working for now?
A. For the D. L. & W. Railroad.
Q. The Delaware, Lackawanna and Western Railroad?
A. Yes, sir.
Q. You have been working for them since July, 1909?
A. No.
Q. How long have you been working for them?
A. I worked with Mr. Campbell around five years, and last New Year's I quit that iron work.

Q. Prior to the accident of July 31st, 1909, you never saw Pederson walk over that temporary bridge?

A. I never saw Pedersen walk over that bridge before.

Q. If he had gotten a warning of a train before he approached the east-bound track and before he was on the temporary bridge, he could have stepped on the embankment, could he not?

A. He could have stepped down the bank.

Q. But if he was on the bridge there was no place of safety for him to go?

A. No.

69 Recross-examination.

By Mr. CAMPBELL:

Q. Before he got on that bridge, if he had looked ahead he could have seen the train coming, could he not?

A. I will tell: If you walk on that bridge with a weight on your back around ninety to a hundred pounds—that was the weight I had on my back—you can't see very far ahead. You have to stoop and stand still if you want to look ahead. It keeps you down. You can't look far ahead. Your back won't let you.

Q. Could you see a train approaching from the James Street bridge?

A. I saw the train approaching many times.

Q. From the James Street bridge? How far away would that be from the James Street bridge?

A. I couldn't say. I couldn't tell you. It is quite a distance.

Q. When you are standing on the east side of the James Street bridge looking down towards the drawbridge you can see trains coming over it, can you not, very readily?

A. If there is nothing in the way, yes, you can see trains coming when they are coming over the bridge.

Q. How far do you suppose that drawbridge is from the James Street bridge?

A. I couldn't tell you exactly.

Q. Is it more than five hundred feet or a thousand feet or a half mile, or what?

A. I think it must be near a quarter of a mile.

Q. Standing on the James Street bridge and looking west you can see the trains coming over that drawbridge very readily, can't you, if you are looking?

A. Well, yes, if there is nothing in the way.

Q. What would be in the way—some other train?

A. If a west-bound train is on the other track you couldn't see.

70 By Mr. LEVI:

Q. Did you see the train on the east-bound track before you stepped on the temporary bridge to go across?

A. I did not.

By Mr. CAMPBELL:

Q. Did you look for it?

A. Yes.

Q. Why didn't you see it, then?

A. I always had to look out for my own safety. If I saw a train—I was not far over the bridge when the train stopped so quick that he caught Pederson. If I saw the train was so near to it I wouldn't cross the bridge.

Q. Why couldn't you see one hundred and thirty over a quarter of a mile away while crossing that bridge?

A. If I stood like you are now, but not if I have a hundred pounds on my back.

Q. Where was No. 130 when you went up and found Pederson? You say it stopped quickly. Where was it? Was the locomotive on the James Street bridge and Pederson's body right underneath it? Where was the locomotive of 130? Was it right over the bridge and were the trucks right over Pederson?

A. Yes, sir.

Q. And Pederson was on the bridge, was he not?

A. Yes, sir.

Q. What part of the locomotive was over him?

A. So far as I know, only the pony truck.

Q. Do you mean the front part of the locomotive?

A. Yes, sir.

Q. That was the only thing that had passed over Pederson?

A. Yes, sir.

Counsel for defendant admits that the Delaware, Lackawanna and Western Railroad Company is a Pennsylvania corporation.

71 Counsel for plaintiff offered in evidence sketch drawn and identified by the witness Campbell.

Plaintiff rests.

Mr. CAMPBELL: If your Honor please, I move for a non-suit, upon the following grounds:

First. There is no evidence of negligence upon the part of the company proved.

Second. That Pederson was guilty of contributory negligence.

Third. That Pederson assumed the risk.

Fourth. If there was any negligence upon the part of the company by reason of the acts of the foreman, Campbell, Theodore Conrad, or the engineer of train 130, they were fellow-servants of Pederson. That eliminates the question, of course, of the Federal Liability Act, which abolishes everything except the assumption of risk.

The COURT: I do not think you need argue the points. I will reserve the general question, under which you may raise them afterwards.

Mr. CAMPBELL: I will also say that Pederson does not come under the Federal Employees Liability Act, under the evidence in this case.

The COURT: That is also a matter that can be raised later.

Mr. Campbell opened the case in behalf of the defendant.

At one p. m. Court took a recess until 2 p. m.

72 2 p. m.

Defendant's Evidence.

JAMES JOSEPH GASH, having been duly sworn, was examined as follows:

By Mr. CAMPBELL:

Q. Where do you live?
A. At the time of the accident I resided in Hoboken. I am now residing in South Orange.
Q. Were you working for the Lackawanna Railroad Company at that time?
A. Yes, sir.
Q. Are you still working for them?
A. Yes, sir.
Q. You were engineer on train 130 that hit this man Pedersen?
A. Yes, sir.
Q. Where was that train running from and to where?
A. Going from Mont Clair, New Jersey, to Hoboken, New Jersey.
Q. When did you first see this man Pedersen?
A. Within a few feet, a very short distance, when he stepped on the track. When I first sighted the man he was standing alongside the track, standing still looking at a train passing on the westbound track. When this train was within about two cars past my engine he stepped up and on the track and walked across. I didn't have ample time hardly to pull the whistle. My first move was to apply the emergency brakes, blowing the whistle at the same time, with both hands working. When I stopped I stopped with the engine trucks standing on the end of the bridge work with the back pair of wheels. When I got down to look the man was laying down in the bridge work with his arms hanging over a beam in that position (indicating) in the opening between the bridge.

Q. What part of the bridge was this?

73 A. It was on the north side of the trestle, on the left side of my engine.

Q. What do you call the north side?
A. If I was going, that would be the north side.
Q. Was it the side toward your engine where you were going, the side toward Hoboken, or the side of James Avenue?
A. On the west side.

By the COURT:

Q. You mean he had nearly got over the bridge, or had he just stepped on the temporary bridge?
A. As near as I could see he was right by the edge of the bridge. I couldn't just notice, I was watching the man to see if he would get clear.
Q. When you stopped and found him under the truck was he nearly over the bridge?
A. Yes, sir. He was just about to the outside rail, walking across.

When I got down I found his legs laying between the flag box and the tool box.

Q. This man was walking west. He was walking west over this trestle, was he not?

A. No; he was walking directly across.

Q. Was he walking west or in what direction?

A. North. He was across the bridge.

Q. He was walking north?

A. Yes, sir.

Q. Was he struck at the north end of the trestle or at the south end of the trestle?

A. He was struck at the west end of the bridge. He was walking north, but west would be running this way.

Q. Suppose he was going over here to the other end of the room, suppose the trestle runs this way?

A. The trestle runs this way.

Q. That is north. Was he at that end of the bridge?

A. He was at this end of the bridge. I was coming this way and he was here.

74 Q. That is, he had apparently, according to your account just about stepped on the bridge?

A. Just about stepped on the bridge when I stopped.

By Mr. CAMPBELL:

Q. He was not on the bridge when you hit him?

A. Not from where I struck him, because I knocked him down.

Q. When you first saw Pederson, where was he?

A. Off to the side of the track.

Q. He had not got on it?

A. He had plenty of clearance, within three feet of the train.

Q. How were your emergency brakes?

A. In perfect condition.

Q. Was the bell ringing?

A. Yes, sir. I had an automatic bell ringing.

Q. When did you start ringing that automatic bell?

A. Leaving Newark.

Q. Had it been operated all the time?

A. All the time, continuous.

Q. Was it ringing at the time you hit Pederson and before?

A. Yes, sir.

Cross-examination.

By Mr. LEVI:

Q. You called on Mr. Pederson at the Scranton Hospital, did you not?

A. No, sir; I did not.

Q. St. Mary's Hospital?

A. Yes, sir; St. Mary's Hospital.

Q. When was that?

A. I wouldn't say it was the Sunday right after the accident or the Sunday after that.

Q. What did you go there for?

A. I went to see the man. I live right near the hospital.

75 Q. Did you have any conversation with Pederson about the accident.

A. Just a slight conversation; yes, sir.

Q. You did not tell him at that time what you did and what you did not do?

A. No, sir; I told him I did all in my power to stop. I remember telling him that distinctly.

Q. Did you not tell him you did not ring the bell?

A. No, sir. No such conversation took place.

Q. And that you blew the whistle?

A. And I blew the whistle.

Q. You said if you had thirty feet more to go you could have saved him?

A. No; I didn't tell him that. It would not take thirty feet to do it, because we only run over on him with the engine truck and that is only six feet.

Q. What time did you have your conversation with this man at the hospital?

A. I can't remember that. It was somewheres in the neighborhood of between one and two o'clock in the afternoon, I believe. Just after church hours.

Q. Was it in August or September?

A. I guess it was. It was in the month of August. I don't know what month it was. I don't remember that. It was one or two Sundays in August or July, I don't know which. I don't have any recollection of what day I went there.

Q. When did the accident happen?

A. I think the accident happened July 31st.

Q. Then you could not have seen the man in July at the hospital.

A. Not very well.

Q. You saw him in August?

A. Yes, sir.

Q. How long after the accident you do not know?

A. It was either the next Sunday or the following Sunday after. I can't remember just precisely.

Q. You knew that this work was going on and that you were traveling on a temporary road bed?

76 A. Yes, sir.

Q. How often had you gone over it?

A. Every day.

Q. Every day for how long prior?

A. While the work was being done.

Q. You knew there were men working all along there, did you not?

A. Every day.

Q. You knew they had to cross that temporary bridge where this accident occurred? You knew that it was a temporary bridge, did you not?

A. Yes, sir.

Q. You knew the men also had to cross the temporary bridge, and work on the temporary bridge, did you not?
A. Yes, sir.
Q. You saw them crossing over?
A. Yes, sir.
Q. Were there any rules, or did you get any instructions from those who are your superiors, your superintendents or foreman, or division superintendent, or whatever you call them, as to the manner and method of running your trains over this temporary roadbed and track?
A. Yes, sir.
Q. What were they?
A. The bulletin issued said trains will not exceed fifteen miles an hour over this work.
Q. Have you got that bulletin with you?
A. No.
Q. Was it not ten miles an hour?
A. Over the bridge work I believe it was ten miles an hour; yes, sir.
Q. What other orders did you have? Weren't you under orders to blow the whistle and ring the bell?

Mr. CAMPBELL: Does your Honor think it is cross-examination?
The COURT: It bears on the degree of care.

77 By Mr. LEVI:

Q. What speed were you going just before you reached the bridge?
A. Between ten and twelve miles an hour, as near as I can judge.
Q. You know, do you not? Did you look?
A. Watching people on the track, we slow our speed down until we think we are going ten miles an hour, and that is the speed I was going. I was not going ten miles an hour when I struck the man.
Q. When did you see the man first before you approached the bridge? How far away were you?
A. I was as close as from here to that gentleman (indicating Mr. Paterson).
Q. That was the first time you saw him?
A. I was further back, and he was not on the track, but when he stepped in front of me he was as close as that gentleman.
Q. When he stepped on the track you saw him on the track and then you gave the whistle?
A. No; the whistle was sounded below that for other trackmen working down below that.
Q. That is how many yards away?
A. It is about two hundred, I think.
Q. It is six hundred feet away, almost a square?
A. Yes, sir.
Q. Did you not swear a minute or two ago that the only time you blew the whistle was when you saw this man on the track, and

you gave him the whistle and you barely had time to give him the whistle when you struck him?

A. When I started this whistle for this man—the man stepped on the track and I pulled the whistle immediately when he got on the track.

Q. Then you were on the bridge when you first saw the man?

A. Which bridge?

Q. This temporary bridge?

78 A. No; I was coming up——

Q. You said you saw him when you were as far away as this gentleman here?

A. I was on the bridge then? I was not on the bridge. When I stopped my engine truck was at the end of the bridge work. I hadn't got on the bridge at all until I struck the man.

Q. How long was the temporary bridge?

A. I don't know what the distance of that bridge is.

By the COURT:

Q. Was it about as long as this room?

A. I don't hardly think so. It may be within a short distance of it.

Q. It has been spoken of as 70 feet. That would be about as long as this room. Is that as near as you remember?

A. As near as I can judge, about that distance.

By Mr. LEVI:

Q. How far away were you when you saw him on the bridge?

A. When he was on the bridge?

Q. Yes.

A. He wasn't on the bridge when I first saw him.

Q. I mean when you first saw him on the bridge. You saw him go on the bridge. How far away was your engine then?

A. I didn't see the man go on the bridge.

Q. You did not see the man go on the bridge.

A. No; I saw the man step from the side of the track over the roadbed, just as he stepped up on the track this train was coming west. He was looking in this fashion.

Q. He was not on the bridge when you struck him?

A. No, sir. Well, he might have been right on the edge of the bridge. When I found him he was knocked down in

79 this bridge work just over the end of the bridge, right close to the abutment.

Q. How far away were you from him the first time you saw the man and before you struck him?

A. I don't understand the question clearly.

Q. The second time when he was immediately in front of the engine. When you saw him the second time, that is immediately preceding the time when you struck Pederson, how far away was your train or your engine?

A. Within a few feet of him.

Q. Did you see him?

A. I saw him get right up and walk over the track. That was the move I saw him make, and I had him like that (snapping hands together) as close as I could stop. So close to me, it was within stopping distance. I just had time to reach and pull the valves both down. That is as quick as I could do the work.

Q. Before you reached the bridge, and for a mile previous, at what rate of speed were you running that train?

A. I should judge the speed of that train until I approached the "slow" board was about forty miles an hour, and then I slowed the train down to about fifteen miles an hour, until I struck the switch, that was over the temporary trestle work, and the train was continuing to go up grade slow speed.

Q. You mean at the rate of fifteen miles an hour?

A. I would not say it was going as fast as 15 miles an hour—between ten and fifteen miles an hour as near as I can judge. Probably it was slower. When I stopped I stopped as quick as (slapping hands together)—it was done like that.

Q. If you are going at the rate of say ten miles an hour, how long would it take you to bring your train to a stop, what distance would you have to cover, putting on the emergency brakes to stop the train? How many feet would you have to travel?

80 A. A five car train ought to stop just as about in the distance I stopped it.

Q. How many feet was that?

A. I should judge about six or eight feet. That is the way the train was stopped that day.

Q. When you saw the man approaching the bridge, coming on the track beyond the bridge, he was in danger then, was he not?

A. He was in danger—no, not when he was clear of my track. He was off to the side. He was in the clear looking at this other train and deliberately walked up on the track in front of me.

Q. He walked up on the track and did he walk on the track before he walked on the bridge?

By the COURT:

Q. Did he walk along the track before he got to the bridge?

A. He walked right straight across the track from the embankment over to the track. Like the outside edge here is the railroad, and here is the track laying along here, and he was over here, and he stepped across this and stopped here and then proceeded. He stopped for a second in the center of the eastbound track about the time of the blowing of the whistle, another step would have almost cleared him.

By Mr. LEVI:

Q. How many feet had your engine traveled over the bridge before you struck this man?

A. The length of the tender truck. I should judge that is about six feet.

Q. You had travelled six feet over the bridge?

A. About six feet. Over the end of the abutment.

Q. Then he must have been near the other end of the bridge where he was trying to cross?

A. On the end I was coming towards. The edge of the bridge is here, and the bridge work is running across.

81 Q. (Plan shown witness.) This is the east bound track, and here is the other track?

A. Yes, sir.

Q. You were coming along on that track, were you not?

A. Yes, sir.

Q. You came from behind this curve?

A. Yes, sir.

Q. You came up this curve and toward this temporary bridge; is that right?

A. Came up to the end of this bridge, and this is the outside of the track, and the man stepped over here across this track and I struck him.

Q. Was he walking in this direction towards you coming from over here?

A. He walked across this direction.

Q. To go over in front of you?

A. He walked right straight across there in front of me, going across over in this direction. He was not walking this way or that way. He just came over this direction and walked across over there, and he was standing here. As I blew the whistle he stepped here and stopped there for a second.

Q. Then he was walking practically in the same direction that your train was coming?

A. No; he was walking across the track.

Q. Headed which way?

A. His head was in the opposite direction facing from me. He was not looking toward me at all. His face didn't turn to me.

Q. Then he really wanted to cross the track in the same direction you were going?

A. Yes, sir. I was going back here, and he was walking in about this direction.

Q. You gave him the whistle. Two hundred yards away is beyond this curve, is it not, where you first sounded the whistle?

A. Yes, sir.

82 Q. Beyond that you sounded the whistle?

A. Yes, sir.

Q. You did not sound the whistle until you were ready to give him a special warning?

A. Just as soon as I saw him make a move to go across the track I blew the whistle again.

Q. But you did not sound any whistle as a general warning to anybody who might be on the bridge before you got there, did you? Did you sound a general warning whistle before you reached that temporary bridge for anybody that might be there, or did you only sound the special whistle for Pederson?

A. I sounded a whistle for this man on the track.

Q. Before that time you did not sound a whistle for over six hundred feet away, two hundred yards? That is true?

A. From this trestle work?

Q. Yes.

A. I sounded the whistle within sufficient distance for anybody to hear me.

Q. Give us the distance. You said two hundred yards. Is that right?

A. I don't know whether the distance is two hundred yards to the Hackensack bridge or not, but it was up this side of Hackensack Bridge.

Q. From the Hackensack bridge you traveled without any whistle?

A. I blew the whistle. I couldn't give any designated point where I started to blow that whistle. I know I blew the whistle warnings.

Q. When did you start your automatic bell going?

A. At Newark. Leaving Newark. That is, the bell had been started at Montclair, but stopped at every station. In starting away from a station, as the engine starts in motion, we start our bell ringing, as soon as the engine starts to go we start the bell.

Q. When the engine stopped the bell would stop, woud it not?

83 A. When we stop at a station we have always got to stop the bell ringing while the engine is standing still, and then we start just as soon as we get the signal whistle to go then we start our bell ringing again, at each and every station.

Q. What was the last station you stopped at before you struck the man?

A. Newark.

Q. There was no stop between Newark and Hoboken?

A. No.

Q. Did you make any statement of this accident in writing after it occurred?

A. I believe I did.

Q. To whom and when was it given?

A. I just don't remember. I gave it to the round-house foreman. I made up my statement to the round-house foreman, the head of the department.

Q. When did you make it?

A. That night when I finished up my day's work.

Q. Have you seen that statement since? Have you read it over since?

A. Yes.

Q. When?

A. I read that over some time ago.

Q. How long ago was it?

A. I was down to the claim agent looking over the statement. I don't know just what time that was. He asked me if there were any corrections, and I said that I didn't know any more that they could put on.

Mr. Levi called upon Mr. Campbell to produce the statement referred to by the witness.

Mr. Campbell stated that he did not have the statement in his possession.

By Mr. LEVI:

Q. How long ago was it you saw that statement?

A. I guess it was about three months after the accident.

84 Q. That would have been in December of last year, or November?

A. Somewheres about that time, as near as I can tell.

Q. Can you tell us at what point you were when you started to run your engine, as you claim, at the rate of 15 miles an hour?

A. I came across the drawbridge, and slowed the train down to 15 miles an hour all the way back.

Q. How far is the drawbridge from the bridge where the accident occurred?

A. I should judge, as near as I could tell, about 150 yards. Somewhere about that distance.

Q. When did you reduce the speed to ten or twelve miles an hour?

A. When I came across the drawbridge I got the train down to slow speed, and when I got the train down to slow speed, I was rolling about ten miles an hour, between 10 and 12 miles an hour over the slow piece of track.

Q. You say you were going between 10 and 12 miles an hour but at the outside you could have been going at the rate of 15 miles an hour?

A. I wouldn't say I was going 15 miles an hour. I was not exceeding.

Q. That is your best testimony?

A. That is as near as I can give.

Q. That you were not exceeding 15 miles an hour?

A. I was not going that speed. Between 10 and 12 miles an hour.

Q. You just said you were not exceeding 15 miles an hour?

A. I was going about 10 or 12 miles an hour.

Q. You might have been going between 12 and 15 miles an hour?

A. Between 10 and 12 miles an hour.

Q. Not between 12 and 15 miles?

A. I don't believe I was going over 12 miles an hour, as

85 near as I can tell the speed I was going at that time. It is a long time ago. That is as near as I have recollection.

By Mr. CAMPBELL:

Q. You have not got a copy of the rules you spoke of with you?

A. No; I haven't got the bulletin.

Q. When did they complete the work?

A. That I haven't got any recollection of, either. The bulletins were taken down some time. They were up there some time.

Q. Are you sure as to what speed the bulletin called for going over that work?

A. I think it was about ten miles an hour. I am pretty sure.

JAMES H. PHILLIPS, having been duly sworn, was examined as follows:

By Mr. CAMPBELL:

Q. What is your business?
A. I am a civil engineer.
Q. What are you doing now?
A. I am working for the Essex County Park Commission in Newark now.
Q. Were you in the employ of the Lackawanna Railroad in July, 1909?
A. Yes, sir.
Q. Whereabouts?
A. I had charge of this West End improvement.
Q. Are you familiar with how James Avenue looked at that time?
A. Yes, sir.
Q. I hand you a photograph and ask you to say what it is.

(Photograph handed witness.)

A. This is a photograph taken from the west side of James Avenue looking east.
86 Q. Does that show the temporary trestle or bridge they are talking about?
A. Yes; that shows the temporary bridge as it was at the time this accident occurred.
Q. That part further on is on the east side of the bridge?
A. That is on the east side of the bridge.
Q. Do you know what space there is for anybody to stand?
A. About twenty-five or thirty feet on the north side of the tracks.

Mr. Campbell proposed to offer the photograph in evidence.

By Mr. LEVI:

Q. When was this photograph taken?
A. It was taken after this accident.
Q. How long after the accident?
A. I did not take the photograph.

Photograph objected to.

By Mr. CAMPBELL:

Q. Does that photograph show the space alongside of the track on the east side as it existed on July 31st, 1909, according to your recollection?
A. Yes, sir.
Q. I hand you another photograph and ask you what that is?
A. That is a photograph taken looking west from the east side of the Susquehanna crossing over the Hackensack river bridge, showing the temporary tracks.
Q. That is going towards James Avenue?
A. Yes, sir.
Q. Is that the way it appeared on July 31, 1909, according to your recollection?

A. There may be some slight work put up there, but otherwise it is about the same.

Q. How about the temporary tracks?

87 A. The temporary tracks are in the same position.

Q. I hand you another photograph and ask you what that is?

A. This photograph was taken west of James Avenue bridge looking east toward the tunnel and was taken considerably after the accident occurred, and there was no filling in the place at that time.

Q. Standing on the east side of James Avenue bridge and looking west, how far could you see a train going east?

A. If there was no west-bound train there you could see it for three-quarters of a mile.

Q. Suppose there was a west-bound train there, how far could you see it?

A. From there about five hundred feet—five or six hundred feet.

Q. Was there any way in which a person could get from the east side of James Avenue bridge to the west side without going across this trestle or temporary bridge?

A. He could walk down the bank on one side and cross the street, and walk up the bank on the other side.

Q. Any building to interfere with a person going that way?

A. No, sir.

Q. Were there any saloons around there where he would have to pass to go from one side of the street to the other?

A. No, sir.

Q. Was there any lumber yard he would have to go through?

A. Not that would interfere with his going, no, sir.

Q. Just a regular open way that he could have used to go around.

A. Plenty of room inside the railroad ground.

Q. On the east side of the track you said there was a place

88 twenty-five feet wide. Tell us whether or not that was level?

A. Approximately level; yes, sir.

Q. What side of the track was that?

A. That was on the north side of the temporary tracks.

Q. A clear space of twenty-five feet to the north where he could have stood?

A. Yes, sir.

Q. What sort of a space was there on the south side of the track when you are on the east side of James Avenue bridge?

A. There was a narrow shoulder there probably three or four feet outside of the ends of the ties.

Q. That would have been plenty of space for a man to have stood to allow a train to go by?

A. Yes, sir.

Q. How about the space between the tracks at that place at that time?

A. These tracks were approximately thirteen feet centers, and the distance between the rails would be a little over eight feet.

Q. What space would there be to stand between train No. 130 going east and train No. 5 going west?

A. Somewhere between two and a half to three feet, I should say.

Q. How long had this work been going on, if you know?

A. It was started in the Spring of that year, somewheres around in March or April.

Q. When did you finish it?

A. It was only finished this last Spring, I believe. I left the road before the work was finished.

Q. Were trains running on this temporary track all the time after it was completed?

A. Not after completion. These temporary tracks on which the train was running at this time was the shift which was made necessary in order to construct the abutments under what had been the existing tracks that threw the trains to the south of the old road bed.

89 Cross-examination.

By Mr. LEVI:

Q. In order to get down the bank, to get down to the street, it was quite precipitous, was it not?

A. I should say it was about a one and a half to one slope, as a railroad bank is.

Q. It was rather rough and hard, was it not?

A. It was an earth fill.

Q. I mean for a man loaded with a bag weighing one hundred and fifty pounds, filled with iron, on his back, on a hot summer day, was it customary for the men who were working in a yard to go in any other way than this man was doing, crossing the bridge?

A. No; it was not the usual thing to go down and come up.

Q. The usual thing was to do just as this man was to walk over the temporary bridge? Is that right?

A. That is the way the men usually went; yes, sir.

Q. If he was close on the temporary bridge could he go from one track to the other and avoid a train that was coming on the track where he was walking?

A. Yes, sir; he could step from the end of the ties of one track to the ends of the ties of the other.

Q. But, if there was a moving train on the one track and he was on the track which was clear at the time, and the train was approaching on the track where he was walking, could he stand anywhere or step anywhere in safety?

A. Not on the bridge.

Q. If he had taken the street, by going down one embankment on the other side of the bridge, and had stepped into the street and come up on the other side of the embankment with the slope that was there, was not that quite precipitous?

A. Yes, sir; it was about one and a half to one slope.

Q. Show the angle that would make.

A. A foot and a half horizontal to a foot vertical.

90 Q. Illustrate it.

A. About an angle something like that. (Illustrating.)

Q. Could a man with one hundred and fifty pounds pack on his back climb that slope with ease?

A. That would depend on his strength, I guess.

Q. It was soft ground, mud—I mean the slope that you speak of?

A. There was no mud there. It was an earth fill, but it was not muddy.

ASA L. ORCUTT, having been duly sworn, was examined as follows:

By Mr. CAMPBELL:

Q. What is your business?

A. Carpenter foreman for the Lackawanna Railroad.

Q Where were you at work on July 31st, 1909?

A. I was working at James Avenue.

Q. Near this temporary bridge that has been talked about?

A. Yes, sir; in connection with the street. Right in under.

Q. Did you witness this accident to Pederson?

A. I did not.

Q. When was your attention first called to it?

A. The train stopped on top and I heard the halloing.

Q. Then what did you do?

A. I went on top and saw the man.

Q. Where was the man?

A. He laid on the west end of the bridge to the north side of the track.

Q. How near the west end of the bridge?

A. Right close, within a few feet of the west end.

Q. Where was the front of the locomotive??

91 A. It was right close, within a few feet of him.

Q. How far west of the abutment of the bridge?

A. Not over four, five or six feet—four to six feet.

Q. Was the great bulk of the locomotive itself west of the bridge?

A. West of the bridge on the fill.

Q. What sort of a place of safety was there on the east side of this James Avenue bridge, on the south side of the track?

A. On the south side of east end of the bridge there is a shoulder, and a slope.

Q. How much of a space for a man to stand there?

A. I should say two or three feet outside of the ends of the ties.

Q. Take the other side of the track, what sort of a place of safety was there there at that time?

A. Where the old tracks had been.

Q. How wide a space would that be?

A. About thirty feet or better, or wider.

Q. Was that level at that time?

A. Comparatively level, the same as the tracks were torn up.

Q. I show you a picture, marked "A" for identification, and ask you to say whether or not that shows the east side of James Avenue as it appeared on July 31st, 1909.

A. It does apparently.

Q. Is there any change?

A. Nothing that I see, only I put up a little form down in the street.

Q. What do you mean by a form?

A. A form for concrete. It shows in the picture.

Q. Thirty-five feet of space that you say he had to stand on on the east side of the track is shown in the middle of the picture?

A. Yes, sir.

92 Q. What sort of a walk would persons have who were using the track, who were obliged to go from one side of James Avenue to the other, without going across this bridge? Would it have been possible for them to go down into the street?

A. They could have gone down the bank and across the street and up on the other side.

Q. It would have been perfectly feasible?

A. Possible.

Q. Would they have to run through any lumber yard or any private property to go through there?

A. I think not. It is all company property on the south side.

Q. Standing upon the east side of James Avenue and on the railroad looking to the west, how far away could you see a train coming towards the east?

A. If the drawbridge was in line with the tracks, not being open, you probably could see two miles.

Q. Suppose there was a train west-bound there, how would that affect the sight or seeing?

A. It might affect it for a short distance. That is through the two miles about half way up.

Q. Do you mean to say that at all times you would be able to see a mile to the westward?

A. At all times you would be able to see two miles to the westward, but part of the distance you couldn't see.

Q. What part of the distance couldn't you see?

A. Through the drawbridge. If there was one train going through the drawbridge I don't say you could see another one going through.

Q. How far is the drawbridge to the westward of James Avenue?

A. Probably a thousand feet.

Q. You could see that thousand feet at all times, could you, from the east side of James Avenue?

A. Yes, sir.

Q. Did you hear any whistles or bells from train No. 130 as it was going east?

93 A. I didn't notice any whistle or any trains particularly that day.

Q. Why wouldn't you notice it?

Objected to.

Objection overruled.

A. Because I was not accustomed to listen for trains.

Q. You were not paying any attention?
A. No, sir. Trains were passing more or less all the time.

Cross-examination.

By Mr. LEVI:

Q. Let me show you this sketch of this temporary roadbed. There is a curve here, is there not? Approaching this bridge you come around a curve? You recognize that as the temporary bridge? (Sketch shown witness.)
A. Is that James Avenue?
Q. Yes; I think that is what they call it. That is about seventy feet long?
A. Yes, sir.
Q. Around the curve there the train on the east-bound track has to pass a curve and comes up along this way in about this angle until you reach the bridge?
A. About five or six hundred feet from the bridge there is a slight curve.
Q. But it says seventy feet. That is about right, is it not?
A. I couldn't say.
Q. Did you make any measurements?
A. No, sir. We never do.
Q. You are a carpenter?
A. Yes, sir.
Q. If there was a train on the west-bound track going west and a man was on the east-bound track on the bridge, standing there, when could he for the first time, if he was looking for the
94 east-bound train, on this track there, where could he see it?
A. He could see the train about two miles this way.
Q. A train passing on the east-bound track?
A. He could see it for about two miles up there, for the reason there is a curve above.
Q. He could see a train with another train on the track? That is your answer?
A. Yes, sir.

By Mr. CAMPBELL:

Q. You say irrespective of whether there was a west-bound train there or not, he had a full view for at least a thousand feet, I understood you to say?
A. What is that?
Q. Irrespective of whether or not a west-bound train was there in the way, Pedersen, by standing in the east side of the James Avenue, looking west, could have seen the east-bound train at least a thousand feet.
A. I should say a thousand feet.

By Mr. LEVI:

Q. Did you ever make any test to confirm that statement?
A. I have seen men in the same position there; yes, sir.

Q. Have you made any test to confirm that statement you have just made?
A. No, sir.
Q. That is only your opinion?
A. Only my own opinion from seeing the trains.

By Mr. CAMPBELL:

Q. What do you base your opinion on? Do you say you were working in the locality for some time?
A. Yes, sir.
Q. Had you been working west of there, too?
A. Yes, sir.
Q. Had you been working east of there?
95 A. Yes, sir.
Q. You had to make certain measurements of the street, did you not?
A. Yes, sir.
Q. In your experience, based on your judgment, you say you could see a thousand feet?

Objected to.

The COURT: He has already told us what he based his judgment on.

A. Yes, sir.

WILLIAM B. BARRETT, JR., having been duly sworn, was examined as follows:

By Mr. CAMPBELL:

Q. You are a photographer?
A. Yes, sir.
Q. And you were on July 30th, 1909?
A. Yes, sir.
Q. Did you take these photographs? (Photographs shown witness.)
A. Yes, sir.
Q. I hand you photograph marked "A," and ask you when that was taken?
A. That photograph was taken on August 20th, 1909.
Q. What does it show?
A. It shows a view looking east from a point west of this James Avenue bridge.
Q. I hand you photograph marked for identification "B," and ask you what that is, and when it was taken?
A. "B" was taken August 20th, 1909. It is a view from a point south of the M. & E. Branch looking west.

Photographs identified by witness offered in evidence by Mr. Campbell.

96 Objected to by Mr. Levi unless it is followed by proof showing that there was no change in the condition of the structure between July 31st and August 20th.

Mr. CAMPBELL: I have shown that by previous witnesses.

The COURT: There has been evidence as to slight changes. Otherwise the evidence is that it was the same.

Photographs admitted and marked "Exhibits A, B, C, H, G."

Defendant Closed.

Plaintiff's Rebuttal.

MARTIN PEDERSEN, recalled.

By Mr. LEVI:

Q. I want you to tell us what the engineer of the train said to you when he called to see you right after the accident.

A. He said the first thing: "I am the man that hurt you."

Q. What else did he say?

A. I said: "Are you?" He said: "Yes. I am sorry for you," he says. I asked him, "Well, didn't you use any bell there?" That was the first question I asked him, and he said: "Didn't you hear the whistle I blowed for you?" I said: "No." He said: "I do my best to stop the train, but if I had thirty more yards I could have stopped it." I said it wouldn't help me much because my foot was cut off then, "you never could stop it before." I was in very much pain, because it was a warm day, and I lost both my legs on Saturday, and I couldn't speak much with him. He only say, "I am sorry for you," and he went away.

97 Q. Did you say anything about ringing the bell?

A. He didn't say anything about that. I asked him, "Why didn't you use the bell?" and he didn't give me any answer.

No cross-examination.

Testimony Closed.

FRIDAY, *October 28th*, 1910.

Present: Parties as before.

Mr. LEVI: May it please your Honor, I have a time table so as to meet the question as to this being an intra-state train. We have a time table here, and I ask leave to reopen the case for the purpose of showing that the train which left Mont Clair was a train carrying people from Mont Clair, New Jersey, to West Twenty-third Street, New York.

The COURT: We know very well you cannot carry to Twenty-third Street, New York.

Mr. LEVI: I mean by ferry. The train itself could not go over there. A railroad could ferry some of its passengers over.

Offer objected to by Mr. Campbell.

The COURT: The case is over, and if objection is made, it cannot be reopened.

Charge of the Court.

McPHERSON, *J.*:

GENTLEMEN OF THE JURY: Counsel in this case on one side or the other have presented to me forty propositions for instruction.

I have examined them, and, in my opinion, to give those in-
98 structions to you seriatim would simply leave your minds in a state of hopeless confusion. Some of them, in my judgment, are not applicable at all; some of them are only applicable more or less remotely to the case that we are trying, and I shall not attempt to answer them, except so far as I shall answer those that I think are relevant in the instructions that I am about to give you, in as connected a way as I can.

This is an action by an employee of a railroad company against his employer for injuries suffered in the employer's service, and there is no presumption of negligence in such a case in favor of the injured party. You know when a passenger is injured by a collision, or an injury of a similar sort, there is a presumption that the carrier has been careless to the passengers; they start out with that presumption, but where a servant is injured by an injury caused in the service of a railroad company, there is no such presumption. The plaintiff is bound to make out his case by the fair weight of the evidence, and he is bound, in the first instance, to show that his employer has been negligent, because this action is founded entirely upon negligence, and if the defendant, the company, has not been proved to be negligent, then there can be no recovery in the present case. The burden of proof is on the plaintiff to establish this negligence by the fair weight of the evidence. There is no requirement in a merely civil case that there shall be proof on either side beyond reasonable doubt as there is in a criminal case, but only that the fair balance of the evidence shall be on one side or the other of the disputed fact.

In the next place, this action is distinctly brought upon a recent Act of Congress, which in some respects changes the law applicable to the case from what it had previously been. I am not going over the law at all in detail; it is not necessary that I should do so; but in this connection I want to say that the Act changes it in this im-
portant respect; that whereas before the passage of this statute
99 it was the law that if a servant was injured by the carelessness of his fellow-servant engaged in the same general line of business, he could not recover from the master—and you are no doubt familiar with that rule, which is called generally the fellow-servant rule; it is regarded as one of the risks of the business that a servant takes when he enters the employment, namely, the possible carelessness of his fellow-servant, so that if that risk falls out against him, he cannot recover—it has been very generally felt, or is coming to be very generally felt, that that rule universally applied at all events, works injustice. There has been a very evident disposition to modify it by statute. Congress has modified it in certain particulars, and, in the present case, I instruct you that that rule is not to

be applied, and if this man was injured by the negligence of a fellow-servant, one who was also in the employ of the railroad company, that fact will not of itself be any bar to his recovery. To apply it more specifically, I understand that the negligence of the defendant company, which is wholly relied upon—and, if I am wrong, I would like to be corrected—that the negligence of the defendant company which is wholly relied upon is the negligence of the engineer in failing to give proper signals as he approached the point where this injury happened. I assume that I am right in that statement, as I am not corrected. That being so, I instruct you, therefore, specifically that the fact that the engineer may have been, judged by the rules formerly in force, a fellow-servant of this plaintiff who was working upon other work on the roadbed, would not be a bar to his recovery in the present case, and, therefore, you may lay that subject entirely aside.

Then, there is another matter which has been called to my attention upon the part of the defendant company, namely, a subject which is often properly called the assumption of risk upon the part of a servant. Without attempting to explain that at all in detail, I may perhaps give you one illustration which will suffice to show you what is meant by it. A servant undoubtedly takes the risk of his employment up to a certain point; and the more dangerous the employment, of course, the more risk he takes. The illustration I have in mind, which I think may be sufficient to explain it, is the case of one of these structural iron workers. We all see them working upon the skeletons of buildings, and we all know what a dangerous work that is. There are certain risks to that business which are quite obvious. It is an occupation that requires the greatest precautions. There is a risk of his foot slipping, there is risk that he may not catch hold properly, or with sufficient accuracy to maintain himself in a dangerous place, and there are many other dangers, but that will suffice. Now, he takes those risks; they are incident to his business, and he cannot carry on the business without them. He must take those risks or he cannot do the work, and, therefore, when a man accepts employment as a worker upon that sort of a building, he necessarily takes the risk upon himself that he may be injured by some such action as that. But he does not take the risk of the negligence of his employer. Neither, in the case which we now have in hand, did the plaintiff, in accepting the employment in which he was engaged, take the risk that his employer, the railroad company, would be negligent in the duty which it owed to him. Therefore, as the only claim in this case with regard to injury is that it arose from the negligence of the employer, you can lay aside the subject of the assumption of risk on the part of the plaintiff. In my judgment, it has nothing to do with the present case.

That brings us now to the questions which are vital, and about which I want to say only a few words. The first one necessarily is, was the defendant company negligent, and did its negligence directly

cause the injury complained of? Because, if there was no
101 negligence upon the part of the defendant company, or if its negligence did not cause this injury, then the plaintiff has no case. I repeat, the negligence complained of is the failure of the defendant company to give proper signals, proper warnings of the approach of this train, and that is a matter which I submit to you for your consideration and for your decision. I do not intend to review the evidence; it is not necessary I should do so; you have heard it recently; it was thoroughly argued upon by both sides; you know what the situation was there; you know the facts which would make it dangerous for a person working at the place where the injury happened; you know the number of trains, or approximately the number of trains, that were passing; you have heard evidence with regard to the circumstances under which this injury is said to have happened, and the whole surroundings, and all the circumstances, as they have been detailed to you by the witnesses here before you. Taking those into consideration, and bearing in mind that it was the duty of the railroad company to give proper and reasonable warning of the approach of this train, the question is, was that duty discharged? Did they give such signals as, under all the circumstances, were proper and reasonable to give notice of the approach of this train? If they did so, then they have discharged their duty, and having discharged their duty, they are not responsible for the injury caused to this unfortunate man. After a man has done his duty he can do no more, and, therefore, if the railroad company, I repeat, did its duty in this particular, which is the only one complained of, the plaintiff's case falls to the ground. I leave now the subject of the defendant's negligence on that point, because, as I have said, to go farther with it would necessarily carry me into a discussion of the evidence, which I do not think it necessary to enter into, and, in fact, desirable to avoid.

The next question for you to determine is whether the
102 plaintiff himself was also negligent, and, thereby, contributed to his own injury. There is conflicting evidence upon this subject. The weight of it is entirely for the jury, and the conclusion to which they may come in view of it is entirely for the jury. No matter how dangerous a work a man may be sent to do, he must take reasonable and proper care of himself, considering all the circumstances. The more dangerous the work is, provided he knows the danger, or ought to know the danger by a reasonable exercise of his faculties, the more care he is properly required to take of himself. The fact that others are bound to take some care of you does not relieve you from the obligation to take care of yourself. A man who is intelligent and in possession of his faculties, knowing he is in a place of danger is bound to take that into consideration, and is bound to exercise a reasonable care for his own safety. If he does not do so, and if his failure so to take care of himself brings about the injury or helps to bring about the injury, he has only himself to blame for it, or he has himself to blame for it in addition to somebody else. The blame is

either all his own, or he shares it with somebody else. In either event, he would be contributorily negligent; his negligence has contributed to the injury, and certain consequences would follow from that. If this man, as some of the testimony indicates,—the weight of it is for you, the credibility of it is all for you—if this man stepped upon this railroad track almost directly in front of a train that was coming, without taking the trouble to look in the direction from which it was coming, without using his senses in the attempt to see danger which was perfectly visible—from the mere presence of the rails he must have known that trains were running on them,—if without using his senses to see whether a train was approaching he stepped directly in front of this engine and was struck down, the jury could hardly escape the conclusion that he had been negli-
gent, and that his negligence contributed to the injury, if
103 it did not wholly cause it. I repeat, the facts are entirely for
you. For my own part, if the facts are as I am supposing, that he stepped directly in front of the train without looking to see whence it came, without using his senses in order to tell him what danger might overtake him, I can hardly see how it is possible to avoid the conclusion that he was guilty of contributory negligence.

Before the passage of this statute, such negligence, if the jury should find it to exist, would have been a bar to his recovery. He could not have recovered at all, because that was the law, and still is in many cases. In cases brought upon this statute, however, Congress has abolished that rule, or, at all events, has materially modified it. It has declared in terms that contributory negligence shall no longer be a bar, but it has provided that it shall have a certain effect in the case, if the jury find it to be established. So that if the jury find it to be established in this case, it is provided that the damages which the plaintiff may recover shall be diminished in proportion to the amount of negligence attributable to such employee. That furnishes you just about as good a standard rule to be applied as could under the circumstances be applied. It is not a subject in which accurate measurement is possible. What that means is, for example, stating it roughly—and nobody can state it other than roughly, I take it—if the man was almost wholly to blame, he ought not to recover much damage. That is, almost all the damage must be borne by himself. If the defendant, the employer, was equally guilty, as near as may be judged, then only one-half of such damages could be recovered by the plaintiff as would be otherwise recovered. Let us suppose that a man were injured so that you could accurately say that he had suffered a thousand dollars—that he was injured so that a thousand dollars would make him whole. If it were
proved that he had been to blame just about as much as his
104 employer, then, under this rule, the jury could only award
him five hundred dollars. If in the case supposed the jury could say roughly that he was two-thirds to blame, the damage would have to be diminished by two-thirds. You may say the standard is a rough one, but it is the only one that is possible. It is not a case where mathematical accuracy can be possible. In the case before us, if you find that the defendant was guilty of negligence, then,

for the purposes of my present instructions, you would proceed to the question of damages—or might proceed at once to the question of damages—how much the man was entitled to recover. Having determined how much that amount is to be, then you would determine whether or not he had been negligent also and his negligence had contributed to the injury, and if you found that to be the case, then the damages which otherwise he would have been entitled to recover, if he had not been negligent, would have to be diminished in accordance with your view of his own conduct. If I have made that clear, it only remains necessary for me to state to you the rules that are applicable to the measure of damages.

The rule is compensation, as has been argued to you. How is compensation to be got at? Of course, if a man has spent money on account of his injury, that is comparatively simple; and, so far as there is any evidence in the case here showing expenditure of money upon the part of this man, he would be entitled to be allowed for it. He has testified that he spent about a hundred dollars. If that testimony is satisfactory to you, he would be entitled to that allowance. He has not been able to work since that time, obviously. You have heard testimony as to how much he was able to earn before the injury. You know how long it has been since he was injured. There also is a subject about which substantial accuracy is possible: If he had been employed all the time from then until now,
105 he would have earned so much money. A reasonable allowance might be made for the chances of his not having employment all that time. But, as I say, there is a subject about which approximate accuracy at all events is possible. When you leave those two subjects, then you come to a region of more or less conjecture, probability, but it is necessary to employ probabilities in determining what else is to be allowed. Of course, whatever money he may be called upon to expend in the future for medical services, for attention due to this injury, is a proper subject for allowance. In the nature of things, nothing more than a probable estimate upon that subject is possible. He is also entitled to a reasonable allowance for whatever pain or suffering he has undergone already, or may be called upon to undergo in the future due to this injury. There is no possible standard that I can state to the jury or that the jury can find for themselves upon that subject. They can do nothing more than treat it reasonably as sensible men and say what is a fair and proper allowance upon that subject. If a man were asked to say in advance how much he would take to undergo such an experience he could not name a sum, in all possibility, which would induce him to do so. I can only commend it to the good judgment and good sense of the jury. Then he is entitled to a fair and reasonable allowance for his loss of earning power. I am speaking now of his future loss of earning power. Anything in the past would be allowed for separately under the instructions I have already given you. His earning power in the future is another subject. You see what he is, you know his age, you have seen his appearance, you can judge with reasonable accuracy what sort of a man he was. Consider his probable expectancy of life, the

condition of his health, the value of his work, his disposition to labor, and whatever relevant matters are suggested or pointed out by the evidence in the case. It is for you to say what would
106 be a reasonable sum to compensate him for the loss of his earning power—how extensively has his earning power been affected, or whether there has been a total loss. If it has only been seriously diminished so that he still will be able to do something or other, the jury will have to determine as best it can about how much the diminution has been. Whatever they find to be his permanent loss is the subject for allowance. It has been suggested to you, as I understand the argument of counsel, that the proper measure to allow would be to capitalize it and give him a capital which would produce a yearly income equal to the sum which he was making. In other words, assuming that he made a thousand dollars a year, you should give him as much money as would produce at interest, four or five per cent., or something like that, the sum of one thousand dollars. Obviously, if that suggestion was intended to be made to you, it is wholly out of the question. There is no such rule, there never was any such rule, with regard to the allowance of damages of this kind. For a very plain reason, what is intended to do is to put in the place of a man's earning power such a sum of money as will fairly represent his lost earning capacity. If you put a sum of capital there which would produce an annual interest equal to what he would earn, of course there the capital would be, no matter what happened to his earning power, and, when he died, that capital would be there just the same, whereas his earning power if he were dead, would be wholly gone, and during the latter years of his life, while he was ill and ail that kind of thing, his earning power would be seriously diminished, and probably wholly suspended. For that reason, the rule which apparently has been suggested to you is not the rule to be applied at all. The jury are simply to take up the subject, considering what his earning capacity is, what it would be likely to be, how long it would be likely to continue, and do the best they can with it, and make a fair and
107 reasonable allowance upon that point. After you have determined what sum would be fairly allowable as damages to the plaintiff in case the defendant company was negligent, then, I repeat, you must consider whether it is to be diminished on account of the contributory negligence of the plaintiff. If he was contributorily negligent, then you must apply this rule of the statute, and diminish it in proportion to the degree of negligence. If the injury was almost wholly caused by his own negligence, of course the damages would be seriously diminished. If it was about an equal matter, if he was careless and the defendant was careless, and it was about half and half, of course, the damages, such as you might agree upon, would be cut in half. I can do no better for you than to give you this general and rather rough rule upon that subject.

There is a legal question in the case with which I need not trouble you, and I will reserve it, in connection with the general question whether there is any evidence to go to the jury in support of the

plaintiff's claim, especially in connection with the plaintiff's first point and the defendant's twenty-ninth point.

Mr. CAMPBELL: Your Honor said that you did not think the question of assumption of risk was in the case at all. I ask an exception to that. Your Honor also said it was the duty of the defendant to give certain signals. I desire to except to the submission of that question to the jury.

Exception allowed.

Defendant's counsel also excepted to the refusal of the learned Judge to answer specifically the points presented by him, which are as follows:

"1. You are instructed that the fact of an accident to an employee raises no presumption of negligence against the rail-
108 road company, and the burden of proof is upon the plaintiff to prove negligence.

2. You are instructed that it is not sufficient for the plaintiff to prove that the defendant may have been guilty of negligence, the evidence must point to the fact that it was, and where the testimony shows that several things may have brought about the injury, for some of which the defendant was responsible, and for some of which it was not, then you cannot guess between them, and if you should find from the evidence that such is the case here, your verdict should be for the defendant.

3. You are instructed that the defendant was not bound to insure the absolute safety of machinery of mechanical appliances which it provided for its locomotives and cars, nor is it bound to supply the best and safest or newest of these appliances for the purpose of securing the safety of its employees. All that is required is to use ordinary care to supply those that are reasonably safe and suitable.

4. You are instructed that the defendant is obliged only to exercise ordinary care in furnishing its employees with a reasonably safe place to work.

5. You are instructed that defendant is not to be held as guaranteeing or warranting the absolute safety under all circumstances, or the perfection in all its parts of the machinery or apparatus which may be provided for the use of its employees.

6. You are instructed that the law is that when a servant in the execution of his master's business receives an injury which befalls him from one of the risks incident to the business, he cannot hold the master rseponsible, but must bear the consequences himself.

7. If you find from the evidence that Pedersen knew that trains were constantly running upon the track where he was injured, and the danger from them was obvious and apparent, then he
109 assumed whatever risk there might be and your verdict should be for the defendant.

8. You are instructed that the defense of assumption of risk is alike available whether the risk assumed is great or small; whether the danger from it was imminent and certain or remote and improbable, and whether or not Pedersen was guilty of contributory negligence in assuming the risk or in exposing himself to the danger.

9. You are instructed that Pedersen by entering and continuing

in the employment of the defendant, assumed the risk and dangers of the employment which he knew and appreciated and those which an ordinarily prudent and careful person of his capacity and intelligence would have known and appreciated in his situation.

10. You are instructed that an employee cannot be heard to say that he did not appreciate or realize the danger where it was obvious and was apparent to an ordinarily prudent person of his intelligence and experience in his situation.

11. You are instructed that among the risks and dangers which the servant assumes by entering or continuing in the employment without notifying his master of them, are those which arise from the failure of the master to completely discharge his duty to exercise ordinary care to furnish the servant with a reasonably safe place to work.

12. You are instructed that when a servant enters into an employment that is hazardous, he assumes the usual risks of the service, and when he continues in the service, with knowledge of the dangers to be incurred, he also assumes the hazard incident to the situation.

13. You are instructed that a servant assumes all such risks arising from his employment, as he knew, or in the exercise of a reasonable degree of prudence might have known, were naturally and reasonably incident thereto and he cannot recover from the defendant for injuries received from such patent risks.

110 14. You are instructed that the risks which an employee assumes from his knowledge thereof, are not affected by the rapidity or promptness with which he may be required to act at the time of the accident.

15. You are instructed that walking upon a double track railroad upon which trains in both directions are frequently running, is a most dangerous thing to do, and the utmost caution must be exercised by the person in so doing.

16. If a train is passing upon one track the person walking upon the tracks must be extra cautious and on the lookout for a train upon the other, and if he is run down by the other shortly after getting upon its tracks by a train which he saw or could have seen, he was guilty of contributory negligence.

17. If a person stands upon a railroad track while awaiting the passage of a train upon the other, and is hit by the train on the track upon which he stood, he is guilty of contributory negligence notwithstanding that train may not have signalled, because the sound of such signal would have been drowned by the noise of the other and would have been of no avail.

18. You are instructed that if you find from the evidence that there was a safe place for Pedersen to have stood, either between or alongside the tracks, to have awaited the passage of the trains, then he was guilty of contributory negligence, and your verdict must be for the defendant.

19. If Pedersen voluntarily and unnecessarily placed himself in a dangerous position, where there were other positions he might have taken, in connection with the discharge of his duty, which were

safe, then he was guilty of contributory negligence and cannot recover.

20. You are instructed that a person entering a dangerous employment must exercise all the care and caution that the perils of the business demand, and if you find that such care and caution were not exercised by Pedersen, your verdict should be for the defendant.

111 21. You are instructed that employees of railroad companies are bound to use that degree of care which the nature of their employment calls for.

22. You are instructed that where a servant has equal means of knowing the danger, so that the master and servant stand equal in that respect, and the servant is not specifically commanded as to the time and manner in which the work may be done, but is told to do a particular thing, and has such discretion that he can have some control over the means, time and manner in which the work may be done, then unless he does it in a way and with the means which will be safest, he is guilty of contributory negligence.

23. You are instructed that where there is a comparatively safe and a more dangerous way of discharging a duty known to a servant, it is negligence for him to select the more dangerous method, and, if his selection directly contributes to his injury, it is fatal to his recovery.

24. You are instructed that Pedersen was a fel- servant of foreman Campbell, and if there was any negligence upon the part of the latter, the defendant would not be responsible.

25. You are instructed that Pedersen was a fellow-servant of the engineers of both trains, and if there was any negligence upon the part of both, or either, the defendant would not be responsible for the same.

26. You are instructed that Pedersen assumed the risk of what occurred, and your verdict should therefore be for the defendant.

27. You are instructed that the defendant was not guilty of any negligence for which it was responsible, and your verdict should therefore be for the defendant.

28. You are instructed that Pedersen was guilty of contributory negligence.

29. Under all the evidence in the case your verdict should be for the defendant."

112 Plaintiff's first point:

"1. The plaintiff was employed in commerce between the States within the meaning of Section 1 of the Act of 1908."

The jury rendered a verdict for the plaintiff for $6,190.

And thereupon counsel for the plaintiff did except to the order of the Court entering judgment for the defendant non obstante veredicto.

And further thereupon the counsel for the said plaintiff did then and there except to the aforesaid charge and opinion of the said Court; and inasmuch as the said charge and opinion, so excepted to, do not appear upon the record,

The said counsel for the said plaintiff did then and there tender this Bill of Exceptions to the opinion of the said Court, and requested

the seal of the Judge aforesaid should be put to the same, according to the form of the statute in such case made and provided. And thereupon the aforesaid Judge, at the request of the said counsel for the plaintiff did put his seal to this Bill of Exceptions, pursuant to the aforesaid statute in such case made and provided, this 27th day of January, A. D. 1911.

JOHN B. McPHERSON, [SEAL.]
District Judge.

113 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1910. No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,

vs.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Motion and Reasons for New Trial.

Filed Nov. 1, 1910.

And now, October 31st, 1910, the defendant by James F. Campbell, its attorney, moves the Court for a new trial, and in support of its said motion files the following

Reasons.

1. The learned Judge erred on pages 39 and 40, in allowing witness to testify from hearsay as to certain rules of the Company in running its trains over the temporary track, or temporary bridge on July 31st to which an exception was granted.

2. The learned Judge erred in his charge to the jury in saying on page 100 of Charge, as follows:

"But he does not take the risk of the negligence of his em-
114 ployer. Neither, in the case which we now have in hand, did the plaintiff, in accepting the employment in which he was engaged *but took* the risk that his employer, the railroad company, would be negligent in the duty which it owed to him. Therefore, as the only claim in this case with regard to the injury is that it arose from negligence of the employer, you can lay aside the subject of assumption of risk on the part of the plaintiff. In my judgment, it has nothing to do with the present case."

3. The learned Judge erred in his charge to the jury in saying, on page 101 of Charge, as follows:

"Taking those into consideration, and bearing in mind that it was the duty of the railroad company to give proper and reasonable warning of the approach of this train, the question is, was that duty discharged? Did they give such signals, as, under all the circum-

stances, were proper and reasonable to give notice of the approach of this train.

4. The learned Judge erred in his refusal to charge the jury upon the several peints submitted.

JAMES F. CAMPBELL,
Attorney for Defendant.

115 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1910. No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Motion for Judgment Non Obstante Veredicto.

Filed Nov. 1, 1910.

And now, October 31st, 1910, the defendant by its Attorney, James F. Campbell, moves the Court to have all the evidence taken upon the trial duly certified and filed so as to become part of the Record and for judgment non obstante veredicto upon the whole record.

At the trial the following point for binding instructions was refused:

"Under all the evidence in the case your verdict should be for the defendant."

JAMES F. CAMPBELL,
Attorney for Defendant.

116 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 1068. April Sessions, 1910.

MARTIN PEDERSEN
vs.
DELAWARE, LACKAWANNA & WESTERN RAILROAD.

Opinion.

Filed Jan. 17, 1911.

Motion by Defendant for Judgment Notwithstanding the Verdict.

MCPHERSON, *District Judge:*

The defendant is a common carrier of freight and passengers by rail, and does both interstate and intrastate business. At the time

of the plaintiff's injury it was engaged in building an additional track near Hoboken, New Jersey. Part of this track was to be laid upon a bridge, and the plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The verdict establishes the facts that the negligence of a locomotive engineer was one cause of the injury, and that the plaintiff, if negligent at all, was nevertheless entitled to recover a considerable sum. The new track when finished was intended for use both in local business and in commerce between the states, but the
117 train by which the injury was inflicted was a purely local train running between two points in the state of New Jersey. The suit is brought under the Employers' Liability Act of 1908, and the question now to be decided is whether that statute affords any relief for an injury under the foregoing facts. If the plaintiff has a remedy in the state courts, it will not be affected by an adverse decision.

In my opinion the question must be answered in the negative. The Act of 1906 attempted to regulate the subject of employers' liability, but was found to be fatally defective, the majority of the supreme court agreeing that the Act was unconstitutional because it undertook to regulate traffic and other matters within the state, and that these unconstitutional regulations could not be separated from the rest of the statute. The principal dissenting opinion was written by Mr. Justice Moody, but he conceded that, if the true interpretation of the statute embraced employés who were engaged in work that had no relation to interstate commerce, Congress had overstepped its power. The whole court were agreed upon this, he said; and the principal ground of his dissent is, that the statute properly interpreted afforded a remedy (page 519) "only to the employés of foreign, interstate, and territorial carriers who are themselves engaged in some capacity in such commerce in some of its manifold aspects." Mr. Justice Harlan and Mr. Justice McKenna declared (page 540) that "The Act reasonably and properly interpreted applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce and to employés who, at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred." And Mr. Justice Holmes stated his view to be (page 541) that "The phrase 'every common carrier engaged in trade or commerce'
118 may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows." While therefore the court was not united upon the proper construction of the Act, it was united upon the proposition, that, if the construction announced by the majority was correct, and if the Act did apply to all common carriers whose business was interstate commerce in whole or in part, without regard to the nature of the business that was being done at the time of the injury complained of, the legislation would necessarily include intrastate business and would therefore transcend the power of Congress.

This authoritative interpretation must have been influential in determining the scope of the Act of 1908—and indeed it is well

known, that the Act was passed for the express purpose of meeting the foregoing decision. The first section bears evident signs of this purpose:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories &c. * * * shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or in case of the death of such employé &c. * * * for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employés of such carrier, or by reason of any defect or insufficiency due to its negligence in its cars, engines" * * * &c.

Under this section the new remedy—which being in derogation of the common law is to be confined to its plain meaning—is only to be available when two facts appear; first, the offending carrier must at the time of the injury be "engaging in commerce between any of the several states &c."; and, second, the injury must be suffered by the employé "while he is employed by such carrier in such
119 commerce." Both these facts must be present or the Act does not apply—the carrier must be actually engaging in interstate commerce, and the employé must also be taking part therein. If therefore the business being done by the carrier is purely intrastate and in the course of such business it injures an employé, the Act does not apply. Neither does it apply, altho' the business being done by the carrier is commerce between the states, if the injured employé is engaged in work that does not properly belong to such commerce. But the Act apparently does not require that the carrier and the injured employé should both be engaged in the same act of interstate business. Commerce between the states has many divisions and sub-divisions, and if the carrier while engaged in doing one kind of interstate work should injure an employé who is engaged in doing another kind of such work, the remedy provided by the Act appears to be available. Difficult questions will no doubt arise in the effort to determine whether the work being done by the employé can properly be regarded as interstate commerce, and also in the effort to determine whether the carrier is also engaged in such commerce; but these questions must be met as they arise, and be decided on the circumstances presented from time to time. This much at least seems clear; the tests to be applied in determining whether a given case falls within the statute have been laid down by Congress in language that is not ambiguous, and this language declares that a right of action does not arise unless the employee be actually engaged in interstate commerce at the time of his injury, and unless also the injury be inflicted while the carrier is conducting the same kind of commerce. Applying these tests, I am of opinion that the present action cannot be maintained. Without deciding the question whether the plaintiff was engaged in interstate commerce at the time of his injury, it seems to me beyond successful dispute that the defendant did not inflict the injury in the course of
120 such commerce. The train was a purely local train carrying passengers between two points in the state of New Jersey, and the business was wholly intrastate.

The cases upon the Act of 1908 have not been numerous, and none of them I think decides the pending question distinctly, altho some of them refer to it. Fulgham vs. Railroad Company, (C. C.) 167 Fed. 660, is wholly concerned with the effect of the Act upon state statutes dealing with the same subject, and with the question whether the right of action survived the death of the injured employé. In Watson vs. Railway Co., (C. C.) 169 Fed. 942, it appeared from the complaint—which was demurred to—that the plaintiff was a fireman on a train then engaged in commerce between the states, and that while so employed he was injured by the negligence of the conductor and engineer. The court held that the Act was a valid exercise of the power granted to Congress by the commerce clause, because it was confined to common carriers by rail engaged in interstate commerce, and to employés while thus actually engaged. The question was also discussed whether the Act applied to injuries caused by the negligence of a fellow servant who was not at the time engaged in interstate business, and the court expressed the opinion that such injuries were covered, altho the point does not seem to have been involved. Taylor vs. Southern Railway, (C. C.) 178 Fed. 380, required the court to decide whether a bridge repairer was engaged in interstate commerce within the meaning of the Act, and it was held that he was not so engaged. The injury was caused by a defective scaffold used in the work of repair, but the question whether it was interstate commerce to erect the scaffold was not considered. In Zikos vs. Railroad Co., 179 Fed. 893—which also arose upon demurrer to a complaint—it was charged that the injury was sustained while the plaintiff, a repairman upon the defendant's track, was driving a spike. It was averred that the spike was worn
121 out and defective, and that this defect was known to the defendant. Upon this branch of the case the only question considered was whether the plaintiff himself was engaged in interstate commerce. The court held that he was, and gave the following reasons for this conclusion: (p. 897.).

"But the track of a railroad company engaged both in interstate and intrastate commerce is, while essential to the latter, indispensable to the former. It is equally important that it be kept in repair. Where the traffic itself is not in fact interstate, although upon a railroad engaged in commerce between the states, such as trains devoted entirely to local business and wholly within the boundaries of a state, a different case is presented. There it is possible to identify what is and what is not interstate; but where, as in this case, a road is admittedly engaged in both, it becomes impossible to say that the particular work done results directly for the benefit of one more than the other. Manifestly it is for the accommodation of both. To hold, then, that a workman engaged in repairs upon the track of such a carrier is not furthering interstate commerce would be to deny the power to control an indispensable instrument for commercial intercourse between the states—to deny the power of Congress over interstate commerce—but that the power extends to the control of those instrumentalities through which such commerce is carried on is not an open question. Having reference to that phase of the subject, the Supreme Court has said:

'That assumption is this: That commerce, in the constitutional sense, only embraces shipment in a technical sense, and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged, and the instrumentalities by
122 which such commence is carried on—a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons v. Ogden, 9 Wheat. 1 (6 L. Ed. 23) and which has not since been open to question.' Interstate Commerce Commission v. Illinois Central Railroad Co., 215 U. S. 452, 30 Sup. Ct., 155, 161, 54 L. Ed. —.

'The power also embraces within its control all the instrumentalities by which that commerce may be carried on and the means by which it may be aided and encouraged.' Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, 204, 5 Sup. Ct. 826, 828, 29 L. Ed. 158.

'Commerce is a term of the largest import. * * * The power to regulate it embraces all the instruments by which said commerce may be conducted.' Weldon v. State of Missouri, 91 U. S. 275, 280, 23 L. Ed. 347.

No doubt there may be situations, indeed we have the highest authority for it (Employers' Liability Cases, supra, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297) when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic, where there could be no ground for claiming liability under the act of Congress, even though the carrier in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question
is an apt illustration of the intricacies to which our dual sys-
123 tem of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

It is apparently assumed that the railroad was engaging in interstate commerce while it was furnishing material for the repair of the track, altho this question is not discussed, and indeed may not have been considered at all.

In Hoxie vs. Railroad Company, 82 Conn. 352, the Act was declared unconstitutional on grounds that are not immediately relevant. This decision is now pending before the supreme court of the

United States. In Colasurdo vs. Railway Co., (C. C.) 180 Fed. 832, it appeared that the plaintiff was engaged in repairing a switch in the defendant's yards at Jersey City. While thus engaged he was injured by the negligence of other employés on a train that had come from Somerville, New Jersey, to Jersey City, and was afterwards being shifted about on the defendant's tracks. The repair of the switch was held to be interstate business, because the switch was used indifferently in both kinds of commerce. Upon the remaining question whether the railway company was engaging in interstate commerce while doing the injurious act, the court held that it was a matter of no consequence whether or not the train that struck the plaintiff was so engaged, giving as a reason (p. 838):

124 "It is true that the Act is applicable to carriers only 'while engaged' in interstate commerce, but that includes their activity when they are engaging in such commerce by their own employés. In short, if the employé was engaged in such commerce so was the road, for the road was the master and the servant's act its act. The statute does not say that the injury must arise from an act itself done in interstate commerce, nor can I see any reason for such an implied construction."

With much respect I am unable to agree with this construction. As it seems to me, the statute does say that the injury shall arise from an act itself done in interstate commerce—for in the light of the legislative history I am unable to find a broader meaning in the words "while engaging in commerce between any of the several states &c." A carrier is not engaging in commerce between the states while it is doing intrastate business, and I think that Congress is not attempting in the Act of 1908 to regulate intrastate business by charging such business with important liabilities. For the purposes of the commerce clause the two kinds of business are as distinct as if they were undertaken by different corporations. One corporation, the interstate carrier, might be regulated by Congress, and therefore its acts might be charged with liability. The other corporation, the intrastate carrier, would not be subjected to federal control, and Congress would have no power to affix legal consequences to its acts. This would be clear enough, I think, if the two kinds of business were actually separated, and were actually performed by two corporations respectively. The fact that only one corporation actually performs them both, makes it more difficult to separate the acts and to assign the proper consequences to each, but in my opinion cannot change the rules that must be applied. It is easy to depict certain anomalies and hardships that may arise.

125 Both are probably inevitable under the dual control exercised by the state and the federal governments over the complicated business of carriers, but this dual control is a fundamental fact in the division of legislative power between these two governments, and the distinction must be observed. In the last analysis it appears to be a question of power. Can Congress regulate the intrastate business of a common carrier? If not, I do not see how it can declare that a purely intrastate act shall subject the carrier to

liability solely because such act has injured a person who at the time is engaged in commerce between the states. Clearly Congress could not so declare if the injured person had suffered while he was engaged in business intrastate in character, and I cannot escape the conclusion that the carrier's liability must be determined by considering what kind of an act did the harm, and not exclusively by the occupation of the injured person. It is doing, or omitting to do, some act that gives rise to a cause of action, and it would certainly be an exceptional exercise of federal power to attempt to give a right of action for a particular wrong unless Congress was also able to forbid the wrong itself. Therefore—and in this region of controversy I express my own opinion with great deference for what may well be the better opinion of others—since Congress can neither directly forbid nor regulate the purely intrastate acts of a common carrier, I believe that it cannot reach the same result indirectly by declaring that important and burdensome consequences shall follow such acts.

Without prolonging the discussion I conclude that the plaintiff is not entitled to recover, because he was injured by an act of the defendant done in the performance of purely intrastate business, and for this reason I direct that judgment be entered in favor of the defendant notwithstanding the verdict. (Exception to the plaintiff.)

126 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 1068. April Sessions, 1910.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Præcipe for Judgment.

Filed Feb'y 1, 1911.

To the Clerk, U. S. Circuit Court, Eastern District of Pennsylvania.

SIR: Enter judgment in favor of the defendant notwithstanding the verdict and against the plaintiff, in accordance with Opinion of Court, filed on January 17, 1911.

JAMES F. CAMPBELL,
Attorney for Defendant.

Judgment.

Filed Feb'y 1, 1911.

Before McPherson, J.

And now this 1st day of February, 1911, in accordance with præcipe filed, judgment is hereby entered in favor of the defendant and against the plaintiff notwithstanding the verdict.

Attest:—

LEO A. LILLY,
Deputy Clerk.

127 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

April Sessions, 1910. No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the laws of the State of Pennsylvania.

Petition for Writ of Error.

Filed Feb'y 1, 1911.

To the Honorable the Judges of the Circuit Court of the United States for the Eastern District of Pennsylvania:

Martin Pedersen, the above named plaintiff, feeling himself aggrieved by the final judgment entered against him in the above entitled case on the 18th day of January, A. D. 1911, comes now by Julius C. Levi, Esq., his attorney and hereby prays that a writ of error may be allowed to the United States Circuit Court of Appeals for the Third Circuit, and also that an order be made fixing the amount of security for costs which the plaintiff shall give and furnish upon said writ of error, and that upon giving said security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the United States Circuit Court of Appeals for the Third Circuit.

And your petitioner will ever pray.

MARTIN PEDERSEN.

128 UNITED STATES OF AMERICA,
City of New York, County of New York, ss:

Martin Pedersen, being duly sworn according to law, deposes and says that he is the plaintiff in the above entitled case; that the statements contained in the foregoing petition, are true, and that the

writ of error therein prayed for is not taken for the purpose of delay, but because he feels that an injustice has been done by reason of said judgment.

MARTIN PEDERSEN.

Sworn to and subscribed before me this 30th day of January, A. D. 1911.

BENJAMIN PATTERSON,
[SEAL.] *Notary Public, New York County.*

Order of Court.

Filed Feb'y 1, 1911.

Before McPherson, J.

And now, to wit, the first day of February, 1911, upon consideration of the foregoing petition and upon motion of Julius C. Levi, Esq., attorney for plaintiff, and upon filing a petition for a writ of error and assignment of errors, it is ordered that a writ of error be and it hereby is allowed, to have review in the United States Circuit Court of Appeals for the Third Circuit, of the judgment heretofore entered herein and that the amount of bond on such writ of error be and it hereby is fixed at Two hundred dollars which shall operate as a supersedeas bond.

BY THE COURT.

Attest:
GEORGE BRODBECK,
Deputy Clerk.

129 In the Circuit Court of the United States for the Eastern District of Pennsylvania.

No. 1068. April Sessions, 1910.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation Created under the laws of the State of Pennsylvania.

Assignments of Error.

Filed Feb'y 1, 1911.

The plaintiff in this action in connection with his petition for writ of error, makes the following assignment of errors, to wit:

1. The learned trial Judge erred in finding as a matter of law in his opinion entering judgment for the defendant, notwithstanding

the verdict, that the case did not come within the Federal Employers' Liability Act of April 22, 1908, c. 149, 35 Stat. 65.

2. The learned trial Judge erred in entering judgment for the defendant upon its motion for judgment non obstante veredicto.

3. The learned trial Judge erred in refusing the offer of the plaintiff made at the close of the trial, to prove that the defendant's train which struck the plaintiff was actually engaged in inter-
130 state commerce, the said offer having been submitted in the following form:

Mr. LEVI: May it please your Honor, I have a time table so as to meet the question as to this being an intrastate train. We have a time table here, and I ask leave to re-open the case for the purpose of showing that the train which left Montclair was a train carrying people from Montclair, New Jersey, to West Twenty-third street, New York.

The COURT: We know very well you cannot carry to Twenty-third street New York.

Mr. LEVI: I mean by ferry. The train itself could not go over there. A railroad could ferry some of its passengers over.

Offer objected to by Mr. Campbell.

The COURT: The case is over, and if objection is made, it cannot be re-opened.

Therefore, the trial Judge erred in refusing to allow the case to be opened, and the plaintiff permitted to prove that the train which injured the *defendant* was a train engaged in interstate commerce.

4. The learned trial Judge erred in holding that the plaintiff was not entitled to recover a verdict unless not only he himself was engaged in interstate commerce, but unless also the defendant train which struck him was so engaged.

5. The trial Judge erred in holding that the plaintiff is not entitled to recover because he was injured by an act of the defendant done in performance of purely intrastate business, for the reason that the statute under which this action is instituted is none the less a regulation of interstate commerce because it creates a liability of an interstate employer to his interstate employee for injury of the latter through the negligence of an intrastate employee.

131 6. The learned trial Judge erred in not dismissing the defendant's motion for judgment non obstante veredicto and entering judgment in favor of the plaintiff upon the verdict.

Wherfore the defendant prays that the judgment of the United States Circuit Court may be reversed and judgment entered in favor of the plaintiff upon the verdict.

BAMBERGER, LEVI & MANDEL,
Attorneys for Plaintiff Below and for Plaintiff-in-Error.

In the Circuit Court of the United States for the Eastern District of Pennsylvania, of April Sessions, 1910.

No. 1068.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
vs.
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, a Corporation Created under the laws of the State of Pennsylvania.

Præcipe Sur Transcript of Record.

Filed Feb'y 13, 1911.

To the Clerk U. S. Circuit Court, Eastern District of Pennsylvania.

SIR: In making up the transcript of record sur writ of error in the above entitled cause you are to include the following papers:

Docket Entries.
Writ of Error.
132 Citation.
Statement of Claim.
Plea.
Bill of exceptions.
Motion for New Trial.
Motion for judgment notwithstanding the verdict.
Opinion.
Assignments of Error.
Petition for writ of error.
Order allowing writ of error.
Clerk's certificate, and no others.

JULIUS C. LEVI.
Attorney for Plaintiff-in-Error.

UNITED STATES OF AMERICA,
Eastern District of Pennsylvania, set:

I, Henry B. Robb, Clerk of the Circuit Court of the United States of America for the Eastern District of Pennsylvania, in the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original pleas and proceedings in the case of Martin Pedersen v. Delaware, Lackawanna & Western Railroad Company, No. 1068, April Session, 1910, as per præcipe filed, a copy of which is hereto annexed, on file and now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court at Philadelphia, this 17th day of February in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

HENRY B. ROBB,
Clerk of C. C.

[SEAL.]

133 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1479.

MARTIN PEDERSEN, Plaintiff in Error,
vs.
D., L. & W. R. R. Co., Defendant in Error.

And afterwards, to wit, on the ninth day of January, 1912, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. George Gray and Hon. Joseph Buffington, Circuit Judges, and Hon. James S. Young, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the eighteenth day of May, 1912, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

134 In the United States Circuit Court of Appeals for the Third Circuit, Oct. Term, 1911.

No. 1479.

MARTIN PEDERSEN, Plaintiff in Error,
vs.
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

Before Gray and Buffington, Circuit Judges, and Young, District Judge.

BUFFINGTON, *Circuit Judge:*

In the court below, Martin Pedersen, a citizen of New Jersey, brought suit against the Delaware, Lackawanna & Western Railroad Company, a corporation of Pennsylvania, to recover damages for personal injuries sustained by him while its employee through its alleged negligence. His statement of claim alleged defendant was "a common carrier of passengers and goods and was engaged in commerce between several of the States of the United States of America, including commerce between the States of New York, New Jersey, Pennsylvania and other States;" and that he himself, "was in the employ of the defendant as an iron worker, and was working in and upon the erection and repair of certain railroad bridges for the said defendant on the 31st day of July, 1909, at or near the City of Hoboken, in the State of New Jersey and was, on said date, and

at said place employed by the defendant in such commerce between the States as aforesaid."

At the trial the court refused defendant's motion for bind-
135 ing instructions and there was a verdict for plaintiff. Subsequently the court, on motion of defendant and in pursuance of the Pennsylvania statute followed by the Federal Courts in that State, entered judgment non obstante veredicto in its favor. Thereupon the plaintiff sued out this writ. The case turns upon the construction of Section 1 of the Act of Congress of April 22, 1908, which provides:

"That every common carrier by railroad while engaging in commerce between any of the several states or territories, or between any of the States and territories, or between the District of Columbia and any of the States or territories, or between the District of Columbia or any of the States or territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and if none, then of such employee's parents, and, if none, then of the next of kin dependent upon such employee, for such injury or death, resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, ro-dbed, works, boats, wharves, or other equipment."

The pertinent facts of this case may, as said in the brief of the plaintiff, "be stated in the language used in the opinion in the court below, as follows: 'The defendant is a common carrier of freight and passengers by rail and does an interstate and intrastate business. At the time of the plaintiff's injury, it was engaged in building an additional track near Hoboken, New Jersey. Part of this track was to be laid upon a bridge, and the plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The verdict establishes the fact that the negligence of a locomotive engineer was one cause of the injury and that the plaintiff, if negligent at all, was nevertheless entitled to recover a considerable sum. The new track when finished was intended for use both in local business and in commerce between the States,
136 but the train by which the injury was inflicted was a purely local train running between two points in the State of New Jersey. The suit is brought under the Employers' Liability Act of 1908, and the question now to be decided is whether that statute affords any relief for an injury under the foregoing facts.' "

In view of the construction given this act in Mondou v. N. Y., N. H. & Hartford Railroad Co., decided January 15, 1912, 32 Supreme Ct. Reporter, 169, that "The Act embraces instances where the causal negligence is that of the employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were also engaged there-

in," the fact that the injury was inflicted by an intrastate train is not material and the case narrows to two questions which may be framed in the words of the statute: first, do the foregoing facts show Pedersen was injured by the railroad "while (it was) engaging in commerce between any of the several states"; second, was such injury sustained by him "while he is (was) employed by such carrier in such commerce"?

Addressing ourselves thereto, we note that the object of this Act was to broaden the right to relief for damages suffered by railroad employees in interstate transportation, for the power of Congress to create such liability to such employees rests on the fact and acts of interstate transportation work which are being done both by the company and by the injured employee at the time of the injury: Mondou v. New York, etc. Co., supra, where it is said: "The Present Act, unlike the one condemned in Employers' Liability Cases, 207 U. S. 463, deals only with the liability of a carrier en-
137 gaged in interstate commerce for injuries sustained by its employees while engaged in such commerce." In that case it is further said:

"Interstate commerce—if not always, at any rate when the commerce is transportation—is an act. Congress, of course, can do anything which, in the exercise by itself of a fair discretion, may be deemed appropriate to save the act of interstate commerce from prevention or interruption, or to make that Act more secure, more reliable or more efficient. The act of interstate commerce is done by the labor of men and with the help of things; and these men and things are the agents and instruments of the commerce. If the agents or instruments are destroyed while they are doing the act, commerce is stopped; if the agents or instruments are interrupted, commerce is interrupted; if the agents or instruments are not of the right kind or quality, commerce in consequence becomes slow or costly or unsafe or otherwise inefficient; and if the conditions under which the agents or instruments do the work of commerce are wrong or disadvantageous, those bad conditions may and often will prevent or interrupt the act of commerce, or make it less expeditious, less reliable, less economical and less secure. Therefore, Congress may legislate about the agents and instruments of interstate commerce, and about the conditions under which those agents and instruments perform the work of interstate commerce, whenever such legislation bears, or in the exercise of a fair legislative discretion can be deemed to bear, upon the reliability or promptness or economy or security or utility of the interstate commerce act. In view of these settled propositions, it does not admit of doubt that the answer to the first of the questions before stated must be that Congress, in the exercise of its power over interstate commerce, may regulate the relations of common carriers by railroad and their employees, while both are engaged in such commerce, subject always to the limitations prescribed in the constitution, and to the qualification that the particulars in which those relations are regulated must have a real or substantial connection with the interstate commerce in which the carriers and their employees are engaged."

It would seem, therefore, that just as the Safety Appliance Acts had, amongst other objects, the lessening of the dangers to employees during interstate transportation, so in pari materia, this act was meant to broaden the relief for damages sustained by employees in such work, for sections three and four embody safety appliance acts as parts of its provisions. Moreover, when this law was passed it was recognized that both the interstate carrier and its employees could each from time to time be engaged in such distinctive
138 intrastate acts as precluded Congress from legislating thereon: Employers' Liability Cases, 207 U. S. 463. Indeed, the title of the Act—"An Act relating to the liability of common carriers by railroad to their employees in certain cases," evidences a purpose to condition the imposed liability on the existence of certain statutory requirements. Now from the emphasis laid by the Supreme Court, as quoted above, on the act of transportation as the basis of fact on which legislation, imposing liability on interstate carriers in favor of their employees engaging in such service, constitutionally rests, we are led to conclude that the injuries sustained by such employees were those suffered while they were engaged in aiding in interstate transportation service. And such is the provision of the Act, for be it observed such liability is not imposed for every negligent act of the railroad, but only "while engaged in commerce between any of the several States," and not for every injury done to every employee, but only to one "Suffering injury while he is employed by such carrier in such commerce." In the application of this statute the experienced trial judge in this case said: "Difficult questions will arise in the effort to determine whether the work being done by the employee can properly be regarded as interstate commerce, and also in the effort to determine whether the carrier is also engaged in such commerce," and we already see the conflicting conclusions reached: Taylor v. Southern Ry. Co. 178 Fed. Rep. 380; Zikos v. Oregon R. & Navigation 893; Colasurdo v. Central R. R. of New Jersey, 180 Fed. Rep. 832; and Behrens v. Central Co., 192 Fed. Rep. 581. But we suggest these difficulties can be met by holding that interstate transportation by the carrier is the act which constitutes the engaging of the statute, and that the person in whose favor the liability is created, or, in the words of the statute, the one who
139 "is employed by such carrier in such commerce," is confined to such employees as at the time of the injury, "have a real and substantial connection with the interstate commerce in which the carriers and their employees are engaged." For, it will be noted, such construction does not, by reason of the general character of their customary work, draw an arbitrary line and confer the benefit of the Act on certain employees, such as engineers, firemen, conductors and brakemen, and exclude others, such as bridgebuilders, station employees or track laborers. On the contrary, it makes the relation of the employee's particular work to interstate transportation at the time the injury is sustained the test. This may often be a difficult subject, owing to the complicated character of a railroad's business, and illustrations may be misleading, but we think reflection will make it clear that the same kind of act may at one time

be a part of interstate transportation, and at another time may have nothing to do with it. If, for example, the nature of an employee's occupation is such that he is sometimes helping to move interstate trains, and again is helping to move trains that are purely local, all that can be said as a general proposition is, that the Act of Congress protects him in one case, and does not protect him in the other. The power of Congress is adequate in one case, and does not exist in the other. It is inevitable that each situation must be considered by itself, and must be tested by the requirements prescribed by Congress: Was the Company engaged in interstate commerce, and was the employee employed in such commerce? If both these questions are answered in the affirmative, the Act applies; otherwise it does not. Adopting this view, holding the act of interstate transportation is an engaging that creates the statutory liability and making any employee who at the time of the injury has a real and substantial part in effecting such transportation, one who "is employed by such carrier in such work," we have a rational and practical basis on which the statute may be enforced. Tested by this standard the case below was rightly decided. The plaintiff was an iron worker on a bridge on which an additional track was being placed. In getting rivets for the bridge he went upon the main eastbound track of the road, where he was struck and injured by a local and intrastate train coming in the other direction. Under such facts, it is clear that neither by operating such local train or by building an additional track or bridge, or by sending the man for the rivets, was the carrier "engaged in commerce between any of the several states," nor was the plaintiff by helping to build such bridge, or by going upon a track which the company was not at the time using in interstate commerce "employed by such carrier in such commerce."

140

The judgment below must therefore be affirmed.

Endorsed: No. 1479. Opinion of the Court. Received and Filed May 18, 1912. Saunders Lewis, Jr., Clerk.

141 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1479 (List No. 4).

MARTIN PEDERSEN, Plaintiff in Error,
vs.
D., L. & W. R. R. Co., Defendant in Error.

In Error to the Circuit Court of the United States for the Eastern District of Pennsylvania.

This cause came on to be heard on the transcript of record from the Circuit Court of the United States, for the Eastern District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said Circuit Court in this cause be, and the same is hereby affirmed, with costs.

JOHN B. McPHERSON,
Circuit Judge.

Philadelphia, May 18th, 1912.

Endorsed: No. 1479. Order Affirming Judgment. Received and Filed, May 18th, 1912. Saunders Lewis, Jr., Clerk.

142 United States Circuit Court of Appeals for the Third Circuit.

MARTIN PEDERSEN, Plaintiff in Error,
against
DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant in Error.

Petition for Writ of Error.

To the Honorable the Justices of the Supreme Court of the United States:

Martin Pedersen, the above named plaintiff in error, feeling himself aggrieved by the final judgment entered against him in the above entitled case on the 18th day of May, 1912, by the Circuit Court of Appeals for the Third Circuit, which judgment affirmed a judgment of the United States Circuit Court for the Eastern District of Pennsylvania, entered against him in the above entitled case on the 18th day of January, 1911, comes now by George Bell, Esq., his attorney and hereby prays that a writ of error may be allowed to the Supreme Court of the United States, and also that an order be made fixing the amount of security for costs which the plaintiff in error shall give and furnish upon said writ of error, and that upon giving said security all further proceedings in this Court be suspended and stayed until the determination of said writ of error by the Supreme Court of the United States.

143 And your petitioner will ever pray.

MARTIN PEDERSEN.

144 UNITED STATES OF AMERICA,
City of New York, County of New York, ss:

Martin Pedersen, being duly sworn according to law, deposes and says that he is the plaintiff in the above entitled case. that the statements contained in the foregoing petition, are true, and that the writ of error therein prayed for is not taken for the purpose of delay, but because he feels that an injustice has been done by reason of said judgment.

MARTIN PEDERSEN.

Sworn to and subscribed before me this 25th day of May, 1912.

BENJAMIN PATTERSON,
Notary Public, New York County.

Endorsed: No. 1479. Petition for Writ of Error. Received and filed May 31, 1912. Saunders Lewis, Jr., Clerk.

145 Before —— ——, J.

And now, to wit, the 31st day of May, 1912, upon consideration of the foregoing petition and upon motion of George Bell, Esq., Attorney for Plaintiff in Error, and upon filing a petition for a writ of errrr and assignment of errors, it is ordered that a writ of error be and it hereby is allowed, to have review in the Supreme Court of the United States, of the judgment heretofore entered herein and that the amount of bond on such writ of error be and it hereby is fixed at Two Hundred and Fifty Dollars which shall operate as a supersedeas bond.

By the Court,

JOS. BUFFINGTON, *Judge.*

Endorsed: No. 1479. Order allowing writ of error. Received and filed May 31, 1912. Saunders Lewis, Jr., Clerk.

146 United States Circuit Court of Appeals for the Third Circuit.

MARTIN PEDERSEN, a Citizen of the State of New Jersey,
against
DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, a Corporation Created under the Laws of the State of Pennsylvania.

Assignment of Error.

The plaintiff in this action in connection with his petition for writ of error, makes the following assignment of errors, to wit:

1. The learned trial Judge erred in finding as a matter of law in his opinion entering judgment for the defendant, notwithstanding the verdict, that the case did not come within the Federal Employer's Liability Act of April 22, 1908, c. 149, 35 Stat. 65.

2. The learned trial Judge erred in entering judgment for the defendant upon its motion for judgment non obstante veredicto.

3. The learned trial Judge erred in refusing the offer of the plaintiff made at the close of the trial, to prove that the defendant's train which struck the plaintiff was actually engaged in interstate commerce, the said offer having been submitted in the following form:

Mr. LEVI: May it please your Honor, I have a time table so as to meet the question as to this being an interstate train. We
147 have a time table here, and I ask leave to re-open the case for the purpose of showing that the train which left Mont Clair was a train carrying people from Mont Clair, New Jersey, to West Twenty-third Street, New York.

The COURT: We know very well you cannot carry to Twenty-third Street New York.

Mr. LEVI: I mean by ferry. The train itself could not go over there. A railroad could ferry some of its passengers over.

Offer objected to by Mr. Campbell.

The COURT: The case is over, and if objection is made, it cannot be re-opened.

Therefore, the trial Judge erred in refusing to allow the case to be opened, and the plaintiff permitted to prove that the train which injured the defendant was a train engaged in interstate commerce.

4. The learned trial Judge erred in holding that the plaintiff was not entitled to recover a verdict unless not only he himself was engaged in interstate commerce, but unless also the defendant'- train which struck him was so engaged.

5. The trial Judge erred in holding that the plaintiff is not entitled to recover because he was injured by an act of the defendant done in performance of purely intrastate business, for the reason that the statute under which this action is instituted is none
148 the less a regulation of interstate commerce because it creates a liability of an interstate employer to his interstate employee for injury of the latter through the negligence of an intrastate employee.

6. The learned Judge erred in not dismissing the defendant's motion for judgment non obstante veredicto and entering judgment in favor of the plaintiff upon the verdict.

7. That the learned United States Circuit Court of Appeals for the Third Circuit erred in not sustaining each and every of the above assignments of error.

Wherefore the plaintiff in error prays that the judgment of the United States Circuit Court of Appeals for the Third Circuit may be reversed and judgment entered in favor of the plaintiff in error upon the verdict.

GEORGE BELL,
Attorney for Plaintiff in Error.

Endorsed: No. 1479. Assignments of Error. Received and filed May 31, 1912. Saunders Lewis, Jr., Clerk.

149 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States Circuit Court of Appeals, before you, or some of you between Martin Pedersen, Plaintiff in Error, and Delaware, Lackawanna & Western Railroad Company, Defendant in Error, a manifest error hath happened to the great damage of the said Martin Pedersen as by his complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same within thirty days, in the said Su-

preme Court of the United States, at the City of Washington, District of Columbia, to be then and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice
150 of the Supreme Court of the United States, at Philadelphia, the 31 day of May, in the year of our Lord one thousand nine hundred and twelve.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk United States Circuit Court of Appeals for the Third Circuit.

Allowed.
By the Court:
JOS. BUFFINGTON, *Judge.*

151 [Endorsed:] 1479. United States Circuit Court of Appeals for the Third Circuit. Martin Pedersen, Plaintiff in Error, against Delaware, Lackawanna & Western Railroad Company, Defendant in Error. Original. Petition, Writ of Error. George Bell, Attorney for Plaintiff in Error, Office & Post Office Address: 302 Broadway, Borough of Manhattan, City of New York. Received & Filed May 31, 1912, Saunders Lewis, Jr., Clerk.

152 United States Circuit Court of Appeals for the Third Circuit, October Term, 1911.

No. 1479.

MARTIN PEDERSEN, Claimant-Appellant,
against
DELAWARE, LACKAWANNA & WESTERN RAILWAY COMPANY,
Libellant-Appellee.

Bond for Damages and Costs.

Know all men by these presents, that the United States Fidelity and Guaranty Company a corporation existing under the laws of the State of Maryland, with its principal offices at Calvert and German Streets, Baltimore, Maryland, is held and firmly bound unto the above named Delaware, Lackawanna & Western Railway Company in the sum of Two Hundred and Fifty ($250.00) Dollars to be paid to the said Delaware, Lackawanna & Western Railway Company, for the payment of which well and truly to be made, it binds itself, its successors and assigns jointly and severally, firmly by these presents.

Sealed with its seal and dated June 5, 1912.

Whereas the above named Martin Pedersen, claimant-appellant, has prosecuted his appeal to the Supreme Court of the United States to reverse the decree rendered in the above entitled suit by the United States Circuit Court of Appeals for the Third Circuit, dated ——, —.

Now, therefore, the condition of this obligation is such that if the above named Martin Pedersen, claimant-appellant shall prosecute his appeal to effect and answer all damages and costs,
153 if *it* fails to make *its* plea good, then this obligation shall be void; otherwise shall be and remain in full force and virtue.

UNITED STATES FIDELITY AND GUARANTY COMPANY,
By HENRY STROUSE,
Resident Vice-President.

Attest:

THEO. HUNT,
Resident Secretary. [SEAL.]

Sealed and delivered and taken and acknowledged this 5th day of June, 1912, before me—
—— ——.

Endorsed: No. 1479. Bond on Appeal to U. S. Supreme Court. Received and Filed June 8, 1912. Saunders Lewis, Jr., Clerk.

154 UNITED STATES OF AMERICA, *ss:*

The President of the United States to Delaware, Lackawanna and Western Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be holden at the City of Washington, District of Columbia, within thirty days, pursuant to a writ of error filed in the Clerk's Office of the Supreme Court of the United States, wherein Martin Pedersen is Plaintiff in Error and you are defendant in Error to show cause, if any there be, why the judgment rendered against the said Plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Judge of the Supreme Court of the United States, at Philadelphia, the 31 day of May, in the year of our Lord one thousand nine hundred and twelve.

JOHN B. McPHERSON, *Judge.*

155 [Endorsed:] United States Circuit Court of Appeals for the Third Circuit. Martin Pedersen, Plaintiff in Error, against Delaware, Lackawanna & Western Railroad Company, Defendant in Error. Citation. George Bell, Attorney for Plaintiff in Error, Office & Post Office Address: 302 Broadway, Borough of Manhattan, City of New York.

Service of the within citation is hereby acknowledged.

JAMES F. CAMPBELL,
Of Counsel for Delaware, Lackawanna and Western R. R. Co., Defendant in Error.

156 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original transcript of record and proceedings in this court, in the case of Martin Pedersen, Plaintiff in Error, and D. L. & W. R. R. Company, Defendant in Error, No. 1479, October Term, 1911, on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this Thirteenth day of June, in the year of our Lord one thousand nine hundred and Twelve, and of the Independence of the United States the one hundred and Thirty-sixth.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

Endorsed on cover: File No. 23,273. U. S. Circuit Court Appeals, 3rd Circuit. Term No. 698. Martin Pederson, plaintiff in error, vs. Delaware, Lackawanna and Western Railroad Company. Filed July 5th, 1912. File No. 23,273.

In the Supreme Court of the United States,

OCTOBER TERM, 1912.

No. 498.

MARTEN PEDERSEN,
Plaintiff in Error,

vs.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

MOTION TO ADVANCE CAUSE.

GEORGE HELL,
Attorney for Plaintiff in Error.

In the Supreme Court of the United States,

OCTOBER TERM, 1912.

MARTIN PEDERSEN, Plaintiff-in-Error, *versus* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY, Defendant-in-Error.	No. 698.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

Motion to Advance.

Now comes Martin Pedersen, the plaintiff-in-error, and moves the Court to advance the above-entitled cause for hearing at this Term.

The appeal herein is from a final judgment of the United States Circuit Court of Appeals for the Third Circuit, entered against the above-named plaintiff-in-error on the 18th day of May, 1912, and which judgment affirmed a judgment of the United States Circuit Court for the Eastern District of Pennsylvania, entered against the above-named plaintiff-in-error in the above-entitled cause on the 18th day of January, 1911.

From said judgment of the Circuit Court of Appeals aforesaid, an appeal to this Court has

been taken, and a writ of error sued out by the plaintiff-in-error and the same is now pending and undetermined herein, and is case No. 698 upon the calendar or docket of causes in this Court.

This motion is made for an order to advance the cause for argument out of its regular order in accordance with the rules of this Court permitting such advancement in the classes of cases therein mentioned.

The special and peculiar circumstances are : The circumstances upon which the granting of such order is respectfully prayed for are those appearing in the record showing the nature of the action, the proceedings therein and the question of law involved and may be stated as follows :

This action was brought by the plaintiff-in-error to recover from the defendant-in-error damages for personal injuries received while in the employ of the defendant-in-error, a common carrier by railroad engaged in both interstate and intrastate commerce. The liability of the defendant-in-error is predicated upon the Act of Congress of the United States, approved April 22nd, 1908, entitled " An act relating to the liability of common carriers by railroads to their employees in certain cases," as amended by an Act of Congress, approved April 5th, 1910.

Upon the trial of the action, the jury rendered a verdict in favor of the plaintiff and assessed the damages at the sum of six thousand one hundred and ninety dollars. Thereupon motion of the defendant-in-error, the learned trial Judge ordered that judgment be entered in favor of the defendant and against the plaintiff, notwithstanding the verdict, and judgment was so entered all in accordance with the opinion of the Court thereupon rendered and which opinion appears in the record herein and is reported in Volume 184 of the Federal

Reporter at page 737. This judgment so entered was affirmed by the Circuit Court of Appeals aforesaid, in accordance with an opinion of that Court thereupon rendered, which opinion appears in the record herein and is also reported in Volume 197 of the Federal Reporter at page 837.

The Courts below gave judgment, as aforesaid, upon the sole ground that, as a matter of law, the case did not fall within the provisions of the Act of Congress aforesaid, commonly called the "Employers' Liability Act," in that the plaintiff-in-error was engaged in such work at the time he received the injuries as not, in the opinion of the Court, to constitute him in the words of the Act, a person "employed by such carrier in such (*i. e.*, interstate commerce) work," and in that the carrier, itself, was not, in the opinion of the Court, engaged in interstate commerce when it inflicted the injuries complained of.

The facts upon which these propositions of law were based are stated in both of the opinions of the Courts below as follows:

> "The defendant is a common carrier of freight and passengers by rail and does an interstate and intrastate business, at the time of the plaintiff's injury it was engaged in building an additional track near Hoboken, New Jersey. Part of this track was to be laid upon a bridge, and the plaintiff was hurt upon the uncompleted structure while carrying material from one part of the work to another. The verdict establishes the fact that the negligence of a locomotive engineer was one cause of the injury and that the plaintiff, if negligent at all, was nevertheless entitled to recover a considerable sum. The new track when finished was intended for use both in local business and in commerce between the States, but the train by which the injury was inflicted was a purely local train running between two points in the

> State of New Jersey. The suit is brought under the Employers' Liability Act of 1908, and the question now to be decided is whether that statute affords any relief for an injury under the foregoing facts."

The learned trial Judge after making the foregoing statement which is quoted in the opinion of the Circuit Court of Appeals, continues in his opinion immediately following to say : " If the plaintiff has a remedy in the State Courts it will not be affected by an adverse decision."

The cause of action will expire by limitation under the State law before this cause can be heard in its regular order.

The injuries were received by plaintiff on the 31st day of July, 1909, and if it shall be decided by this Court that the Federal statute does not afford him relief then his remedy in the State Courts against the defendant-in-error or its locomotive engineer or any other person liable will expire by limitation before such decision is made unless this Court grants the present motion and orders this cause to be advanced for argument at an early day. The plaintiff-in-error is and at the time of the accident was a citizen of New Jersey, in which State the injury was received. Four years is the period limited by the statutes of New Jersey in such case made and provided, and such four years will expire on July 31st, 1913, or in about ten months from the date of this motion. Upon this circumstance, among others hereinafter mentioned, the plaintiff-in-error respectfully submits that the case presents special and peculiar circumstances within the meaning of those terms as used in subdivision Seven of Rule 26 of this Court relating to the taking up of a case out of its order on the docket, and which

circumstances, it is respectfully submitted, should appeal to the conscience of this Court.

The question of the application of the Employers' Liability Act to the class of cases to which the case at bar belongs has led to a diversity of decisions in the several jurisdictions of the Courts of the United States, and public interests as well as the interests of future litigants will be subserved by an early and authoritative interpretation by this Court.

The questions of law arising in this case and decided adversely to the plaintiff's contention have given rise to a diversity of opinion in the Federal and State Courts, and owing to the conflicting interpretation of these Courts it is essential to the due administration of the law that an authoritative and controlling interpretation of the Employers' Liability Act in regard to such questions should be speedily given by this Court in order that the confusion and conflict of decisions now existing may be terminated. The cause at bar affords occasion for such action. The question whether an employee engaged in constructing or repairing a track used or intended for both interstate and intrastate commerce is employed in interstate commerce has been variously decided by the various Federal Courts. Thus, in the case at bar, the Third Circuit Court of Appeals holds that such employee is not so engaged, while the Second Circuit Court of Appeals in Colorasudo vs. N. Y. Cent. R. R. Co., 192 Fed., 901, affirming 180 Fed., 832, holds that an employee working on a track used for both classes of traffic is engaged in interstate commerce and is within terms of the act.

In Zikos vs. Railroad Co., 179 Fed., 893, the U. S. Circuit Court for Eastern District of Washington held that an employee engaged in repairing a

track used for both classes of traffic was engaged in interstate commerce within the meaning of the Employers' Liability Act.

In Taylor vs. Southern Railway, 178 Fed., 380 the Circuit Court for N. D. of Georgia held that a bridge repairer was not engaged in such commerce.

The question whether the fact that the train or fellow-employee causing the injury was engaged in intrastate commerce and not in interstate commerce at the time of the infliction of the injury has also been variously decided. In the case at bar it is held that not only must the injured employee have been engaged at the time of the accident in interstate commerce as strictly limited and defined herein, but also that the railroad and its employees whose negligence caused the injury must at the time of such injury have been engaged in interstate commerce, as so strictly limited and defined by the exclusion of all acts appertaining to intrastate traffic. On the other hand, other jurisdictions hold that it is immaterial whether the common carrier or its servant causing the injury is engaged in interstate or intrastate commerce at the time of the accident provided only that the servant is employed at the time of the accident in the interstate commerce of the defendant railroad.

Thus in the Colorasudo case, *supra*, the injury was inflicted upon the track repairer by a local train engaged in intrastate traffic and it was held that the character of the commerce of the train or negligent agent producing the injury was unimportant. Likewise in Watson vs. Railway Co., 169 Fed., 660, in the United States Circuit Court Arkansas, E. D., the injuries were caused by negligence of a fellow-servant at the time engaged in intrastate traffic and it was held that it was immaterial that he was so engaged.

In this confusion of the authorities, Courts, Fed-

eral and State, must await a decisive ruling of this Court upon the question—

(1) WHETHER THE ACT DOES NOT APPLY UNLESS BOTH THE EMPLOYEE INJURED AND THE RAILROAD CAUSING THE INJURY WERE AT THE TIME OF THE INJURY ENGAGED IN INTERSTATE COMMERCE, AND ALSO UPON THE QUESTION;

(2) WHETHER THE SERVANT INJURED IS NOT ENGAGED IN INTERSTATE COMMERCE UNLESS HE IS AT THE TIME ACTUALLY ENGAGED IN INTERSTATE TRANSPORTATION AS DISTINGUISHED FROM WORK UPON ROADBED, FIXTURES OR OTHER PLANT OR ACCESSORIES USED FOR THE PASSAGE OR PROMOTION OF INTERSTATE COMMERCE.

In the present state of the decisions interpreting the Employers' Liability Act, Courts are without other guide than the general principles of broad construction of the Act laid down by this Court in the Second Employers' Liability Cases, 223 U. S., 1, where this Court, in treating of the constitutionality of the Act said:

> "The second objection proceeds upon the theory that even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. *But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of Congressional power.* As was said in Southern Railway Co. vs. United States (222 U. S., 20–27), that power is plenary

> and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the sources of the danger which threaten it. The present act, unlike the one condemned in Employers' Liability Cases (207 U. S., 463), deals only with the liability of a carrier in interstate commerce for injuries sustained by the employees while engaged in such commerce. *And this being so, it is not a valid objection that the act embraces instances where the casual negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were engaged therein.*"

For these reasons it is respectfully submitted that public interests as well as interests of the plaintiff-in-error will be subserved and much needless litigation prevented by the authoritative interpretation of the Act, in the respect aforesaid, at an early day, to which end the cause at bar should be advanced for argument out of its regular order and set down for hearing on a day certain to be fixed by the Court.

For all of which relief the plaintiff-in-error respectfully prays.

Dated September 30, 1912.

GEORGE BELL,
Attorney for Plaintiff-in-Error,
302 Broadway,
New York City.

Please take notice, that the foregoing motion to advance the above-entitled cause and to set the same down for argument upon a day certain to be fixed by the Court, will be presented at the opening of court, at the Capitol, in the City of Washington, District of Columbia, on the 14th day of October, 1912, or as soon thereafter as counsel can be heard.

Dated September 30, 1912.

GEORGE BELL,
Attorney for Plaintiff-in-Error.

To JAMES F. CAMPBELL, Esq.,
Attorney for Defendant-in-Error.

3

In the Supreme Court of the United States.

OCTOBER TERM, 1912.

No. 698.

MARTIN PEDERSEN,
Plaintiff-in-Error,

versus

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY,
Defendant-in-Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF-IN-ERROR.

GEORGE BELL,
Attorney for Plaintiff-in-Error.

BENJAMIN PATTERSON,
Of Counsel for Plaintiff-in-Error.

WM. BIEGRIST, Law Printer, 146-148 Worth St., New York

INDEX.

Argument.

Index of Cases Cited.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1912.

MARTIN PEDERSON, Plaintiff-in-Error, *versus* DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, Defendant-in-Error.	No. 698.

Brief for Appellant-in-Error.

This action was brought in the Circuit Court of the United States for the Eastern District of Pennsylvania to recover from the defendant-in-error damages for personal injuries received by plaintiff while in the employ of the defendant and under circumstances which, he claims, entitle him to recover such damages under the term of the Act of Congress of April 22d, 1908, known as the Employers' Liability Act. That Act by Section 1 thereof provides:

"That every common carrier by railroad while engaging in commerce between any of the several States and territories or between any of the States and territories * * * shall be liable in damages to any person suffering injuries while he is employed by such carrier in such commerce * * * resulting in whole or in part from the negligence

of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency due to its negligence in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

There is no dispute as to the fact that the defendant is a common carrier of freight and passengers by railroad and engaged in both interstate and intrastate commerce, nor of the fact that plaintiff was in its employ and was engaged in its work at the time of the accident (pp. 23, 27, Record).

The questions involved in this appeal are whether the injury happened while defendant was engaging in interstate commerce and while plaintiff was employed by defendant in such commerce within the terms and purposes of the act aforesaid.

Upon the trial of the action the jury rendered a verdict in favor of the plaintiff, but upon motion of the defendant a judgment in its favor, notwithstanding the verdict, was entered (p. 80, Record), whereupon plaintiff sued out a writ of error to the Circuit Court of Appeals and the judgment was there affirmed, from which affirmance this appeal to this Court was taken by writ of error. It appears by the opinion of the trial Judge as well as that of the Circuit Court of Appeals the verdict was set aside and judgment entered in favor of defendant solely upon the ground that the Act of Congress aforesaid did not apply, in that the injuries were not caused by the defendant while it was engaging in interstate commerce and while the plaintiff was engaged in such commerce. It is therefore deemed unnecessary to state the facts further than so far as they bear upon the question of the applicability of the Act. The testimony showing negligence which caused the injury is therefore not here adverted to.

Statement of Facts.

At the time of the accident defendant was building a new bridge to carry its Boonton Branch tracks, interstate and local, upon which bridge plaintiff had been working as an iron worker in the employ of defendant up to the day of the accident. This new bridge was not completed and no trains were passing over it and, therefore, the plaintiff, who was run down by a train of cars was not hurt upon that bridge (p. 15, fol. 24, Record). Attention is called to this because that is the only case in which trains were not running over any of the three several bridges mentioned in the testimony. The plaintiff was run down while on another bridge known as the James avenue bridge (p. 18, top) and no repairs were being made or additional track being laid on that bridge so far as the testimony shows. The third bridge mentioned in the testimony was known as the Duffield street bridge and to that bridge there was being added an additional track (p. 26, fol. 42, Record). This Duffield street bridge was in actual use for the passage of interstate trains (p. 27, fol. 44, Record) and the defendant was not only engaged in laying the new track thereon but in putting in a new girder in place of one to be taken out (p. 27, fols. 43, 44, *id.*). The new girder was, evidently designed to strengthen the bridge in order to insure the safety of trains passing over it. The plaintiff was engaged on the day of the accident solely in work connected with this new girder and he had no connection with the laying of the new track over that particular bridge or any bridge (p. 27, fol. 43, Record). It is therefore inaccurately stated in the opinion below (p. 74, top) that an additional track was being laid upon the bridge and that plaintiff was hurt upon the uncompleted structure and that the new track when

finished was intended for use both in local business and in commerce between the States. The testimony is that there were no trains and no tracks going over the new bridge (Boonton Branch), and that the other two bridges (James avenue and Duffield street) were in actual use for interstate trains, and that plaintiff was engaged in work appertaining to the putting in of a new girder in place of an old one on the Duffield street bridge. The fact that an additional track was also being laid on the Duffield street bridge which the learned Judge states was intended when finished to be used in both local and interstate commerce is therefore immaterial, and the intimation that plaintiff was engaged in work appertaining to the laying of that track is incorrect. We deem the foregoing correction necessary in order to avoid the conclusion that plaintiff was working upon a structure which was not then actually used as an instrumentality of interstate commerce, but only upon a structure intended for future use in such commerce. With this explanation the essential facts may be stated as follows:

On July 31st, 1909, the plaintiff was called by defendant from work upon the uncompleted Boonton Branch bridge over which no trains were running and ordered to go to work on another bridge known as the Duffield street bridge, then actually in use by the defendant in its interstate business over which trains passed from Hoboken, N. J., to Buffalo, N. Y., through the several States of New Jersey, Pennsylvania and New York (pp. 27, 28, Record). It was intended to take out a girder and put a new one in its place on this bridge and as the preliminary work towards the same the foreman told plaintiff and Conrad, another workman, to separate rivets or bolts of certain lenghts which were needed and then take them to the Duffield

street bridge (*Id.*). Plaintiff and Conrad then sorted out the bolts or rivets and each filled a bag with the same and proceeded on the way to the Duffield street bridge each carrying a load of about one hundred pounds of those articles (fol. 69, p. 44, Record). In order to reach their destination which was about eight hundred yards away (p. 16, Record) the men walked along the usual route over a temporary bridge known as the James avenue bridge over which ran two tracks of defendant but which had no footpath (pp. 23, 24). While plaintiff was crossing this James avenue bridge by walking on the ties, an interstate train of the defendant going west came up behind him ; plaintiff heard its warning whistle (p. 10, fol. 17). To avoid it he stepped upon the eastbound track, when a train of defendant coming around a curve appeared in front of him. Plaintiff was unable to avoid it without jumping into the street forty feet below as the westbound train was passing over the other track.

Thus caught between the trains, plaintiff was run over by the eastbound train and lost a leg and the foot from his other leg. The train which hit him was going from Montclair, N. J., to Hoboken, New Jersey (p. 46, fol. 72), but further than that fact the record does not show whether it was engaged in interstate commerce. Plaintiff at the trial did not regard the character of that train as material, and does not now. Defendant contended at the trial that it was a intrastate train and that that fact determined that defendant was not engaging in interstate commerce at the time of the injury. In view of that contention, and out of abundant caution plaintiff asked leave of the Court, after the close of the testimony, to re-open the case so as to meet the question by showing that the train was one which transferred passengers to New York City by ferry but the request was denied (p. 62, fol. 97).

The Court evidently took judicial notice of the fact that the defendant's trains do not run into New York City and that Hoboken was the end of the train service and that the Hudson River intervened at that point, but did not take judicial notice of the fact that railroads having train service to the Hudson River ferry their passenges across to New York City.

Specification of Errors.

By assignments of error in both Courts below plaintiff specified as errors the finding as a matter of law that defendant was entitled to judgment notwithstanding the verdict and in so entering judgment (pp. 80 and 90, Record), and intends to urge such errors here.

POINT ONE.

The plaintiff was employed by the defendant in its interstate commerce at the time of the injuries.

The defendant is an interstate railroad. Its counsel admits that it is in some of its phases, and that branches of interstate commerce are carried over it (p. 27, fol. 43, Record). It is proved that it runs trains over its Boonton Branch through the States of New Jersey, Pennsylvania and New York, and also through the same States over its Morris and Essex Division (pp. 27, 28, Record), and that it carries through freight from Western points, passing through those States (p. 23, *Id.*). The James avenue bridge upon which plaintiff was hurt was used by its interstate trains. The train going West, to avoid which plaintiff passed over to the east-

bound track, was bound for Buffalo, New York (p. 32, fol. 51). The Duffield street bridge, to which plaintiff was directed to go was also one used by the defendant for the passage of its interstate trains (pp. 27 and 28, fol. 44).

The plaintiff up to the day of the accident had been at work in the employ of the defendant in taking up beams and fitting and screwing up floor beams upon a new iron bridge for the four tracks of the Boonton Branch of the defendant used in interstate commerce (p. 15, Rec.). Defendant intended to put in a new girder and take out an old one on the Duffield street bridge, used also, as above stated, in its interstate commerce. There was needed for that work bolts and rivets which plaintiff was directed to sort out and carry over to this last-named bridge. The plaintiff was one of those who were to work on that girder that night or at five o'clock the next morning, and the carrying of the bolts was to provide material for that purpose (p. 27, fols. 43, 44; p. 16, top; p. 9, fol. 16, Rec.).

The first question to be decided is whether upon this state of facts plaintiff was employed in interstate commerce.

A.

The opinion in the Circuit Court of Appeals limits the Act to a case where (1) the employment is in *transportation* as such and concurrently (2) the carrier is engaged in an act of transportation, which act is negligent and causes injury to the employee. We, therefore, submit the following to show that Congress has *power* to protect employees while engaged upon any of the instrumentality of interstate commerce, and that such power is not limited to those engaged in transportation, technically so-called, and further, that in view of that

power and the purpose of the Act as well as its terms the plaintiff was employed in interstate commerce at the time of his injury.

That Congress has power to regulate all the instrumentalities of interstate commerce, and is not limited to the regulation of the mere movement of goods, that is, to transportation, pure and simple, has frequently been decided by this Court. Thus, in declaring the Act now involved constitutional, it was held that Congress may legislate about the agents and instrumentalities of interstate commerce and about the conditions under which those agents and instrumentalities perform the work of interstate commerce in

> Second Employers' Liability Cases, 223 U. S., 1,

where the Court said :

> "This power over commerce among the States, so conferred upon Congress, is complete in itself, extends incidentally to every instrument and agent by which said commerce is carried on, may be exerted to its utmost extent over every part of such commerce, and is subject to no limitations save such as are prescribed in the constitution. But of course it does not extend to any matter or thing which does not have a real or substantial relation to some part of such commerce" (p. 47);

and the Court said this in upholding the constitutionality of the present Act, which by its terms asserts the power of Congress to impose liability upon interstate carriers for injuries to their employees in interstate commerce for defects in their cars, engines, appliances, boats, wharves or other equipment.

Under the Commerce Clause of the Constitution

Congress has authorized the formation of corporations for interstate transportation, the building of bridges wholly within the confines of a single State as links in interstate commerce highways, has required pilots in such commerce to have a federal license, has prescribed regulations for steam boilers, life boats, life preservers, and fire apparatus on vessels engaged in interstate commerce, has required the use of prescribed couplers and grab irons on cars in such commerce, and has declared the maximum number of hours of daily toil of workingmen, and the qualifications of locomotive engineers in such commerce. The Acts of Congress so providing have been sustained by this Court.

Luxton vs. N. R. Bridge Co., 153 U. S., 525.
The Clinton Bridge, 10 Wall., 454.
Pacific Ry. Removal Cases, 115 U. S., 1.
Nashville Ry. vs. Alabama, 128 U. S., 96.
Smith vs. Alabama, 124 U. S., 465, 479.
Sprague vs. Thompson, 118 U. S., 90.
Southern Ry. vs. U. S., 222 U. S., 20.

The Interstate Commerce Act of June 29, 1906, amended June 18, 1910, empowers the Interstate Commerce Commission to fix rates for railroad transportation, to compel such railroads to construct, maintain and operate, lateral branch lines, side tracks and switches and also empowers the Commission to regulate the supply and distribution of cars for use in interstate commerce. The Interstate Commerce Act defines the term "railroad" used therein as including "all bridges and ferries used or operated in connection with any railroad and also all the road in use by any corporation operating a railroad * * * and shall also include

all switches, spurs, tracks and terminal facilities of every kind used or necessary in the transportation or delivery of any property * * * and the term '*transportation*' shall include cars and other vehicles and all instrumentalities and facilities of shipment or carriage," etc.

In construing and upholding this Act in

Interstate Commerce Com. vs. Ills. Cent. R. R., 215 U. S., 452,

this Court said :

> "The assumption that commerce in the constitutional sense only embraces shipment in a technical sense and does not, therefore, extend to carriers engaged in interstate commerce, certainly in so far as so engaged and the instrumentalities by which such commerce is carried on (is) a doctrine the unsoundness of which has been apparent ever since the decision in Gibbons vs. Ogden, 9 Wheat., 1, and which has not since been open to question. It may not be doubted that the equipment of a railroad engaged in interstate commerce, included in which are its coal cars, are instruments of such commerce."

B.

The power of Congress to protect those employed upon the instrumentalities of interstate commerce being ample, as shown by the foregoing authorities, the remaining question is: how far has Congress exercised that power in the present Employers' Liability Act? The prior Act was declared unconstitutional by this Court because it was susceptible of such construction as to render the carrier liable for injuries to its servants engaged in intrastate work in no way connected with interstate commerce.

Employers' Liability Cases, 207 U. S., 463.

The present Act was thereafter passed to obviate the fault of the prior Act pointed out by this Court. There can be no doubt that Congress, by each of the Employers' Liability Acts, intended to exercise its power to protect persons employed in interstate commerce by railroad, not only in transportation but upon any of the instrumentalities thereof. The purpose of the acts being to enhance the safety of all interstate employees by imposing liability upon the employer for physical injuries suffered by such employees by reason of the negligence of the employer or of any fellow-servant no reason exists why that purpose should be confined to trainmen operating the rolling stock of a railroad or to those engaged in transportation in its narrow sense.

Those whose work calls them upon those highways of commerce, over which transportation by railroad is going on, are in at least as great danger of physical injury as those who are upon the trains and operating them. The injury of persons engaged in repairing such highways is as great an interference with interstate commerce as is the injury of a trainman. There are classes of employees, such as track walkers, switch tenders, track and bridge repairers, who are employed upon such instrumentalities of interstate commerce and who are subject to the risks of injuries by negligent operation of trains, for which injuries, we submit, it was the purpose of the Act to provide a remedy.

Colasurdo vs. Cent. R. R., 180 Fed., 832–837.

We come now to the language of the Act in order to see how far the purpose and intent of Congress as above set forth is expressed therein.

The original Employers' Liability Act of June 11th, 1906, provided that the carrier should be liable "to any of its employees." The present Act

declares such liability to be "to any person suffering injury while he is employed by such carrier in such (interstate) commerce." There is no limitation here upon the class of employees except the very general one that it shall consist of those employed in interstate commerce while so employed.

The words, therefore, do not warant a construction which will exclude employees while employed in any branch of such commerce. It is evident from a comparison of the two acts and the opinions of this Court in the first Employees Liability cases that by the present Act, Congress intended to limit the words, "any of its employees," only so far as to exclude employees engaged in intrastate work at the time of receiving injuries. Colasurdo vs. Cent. R. R., 180 Fed., 832-837, affirmed 192 Fed., 901, held that the words should be construed so as to include "all those who could be included within the constitutional power of Congress." For the purposes of this Act employees must be classified as either interstate employees or as intrastate employees. Interstate employees, we may suggest, are those whose work is done upon the railroad interstate highway or right of way and its adjuncts, including workers upon the instrumentalities, which are enumerated in Section 1 of the Act as "Cars, engines, appliances, track, roadbed, works, boats, wharves or other equipment" when on such highway.

Negligence of the defendant, its agents or employees causing said injury being assumed and admitted, it is respectfully submitted that plaintiff is within the terms of the Act a person suffering injury while employed in interstate commerce.

POINT TWO.

The defendant was engaged in commerce between States at the time of the injuries.

The Act limits the liability of the carrier by the words "while engaging in commerce between any of the several States, etc.." It is asserted in the opinion of the trial Court that the train which struck the plaintiff was an intrastate train and that therefore the defendant was not engaging in interstate commerce in operating said train and as the negligence of defendant was predicated solely upon acts or omissions of persons operating that train the Act did not apply. After that opinion was delivered (Jan. 17, 1911) this Court decided the Second Employers' Liability Cases, 223 U. S., 1, on January 15, 1912. The Circuit Court of Appeals in view of the decision of the Court last mentioned declared that the fact that plaintiff was hurt by an intrastate train is not material (p. 86, top, Record).

What this Court said on that subject in the Second Employers' Liability Cases, *supra*, was:

> "The second objection proceeds upon the theory that even although Congress has power to regulate the liability of a carrier for injuries sustained by one employee through the negligence of another, where all are engaged in interstate commerce, that power does not embrace instances where the negligent employee is engaged in intrastate commerce. *But this is a mistaken theory, in that it treats the source of the injury, rather than its effect upon interstate commerce, as the criterion of Con-*

> *gressional power.* As was said in Southern Railway Co. vs. United States (222 U. S., 20–27), that power is plenary and competently may be exerted to secure the safety of interstate transportation and of those who are employed therein, no matter what the sources of the danger which threaten it. The present Act, unlike the one condemned in Employers' Liability Cases (207 U. S., 463) deals only with the liability of a carrier in interstate commerce for injuries sustained by the employees while engaged in such commerce. *And this being so, it is not a valid objection that the Act embraces instances where the causal negligence is that of an employee engaged in intrastate commerce; for such negligence, when operating injuriously upon an employee engaged in interstate commerce, has the same effect upon that commerce as if the negligent employee were engaged therein.*"

In the case of Southern R'y vs. United States (222 U. S., 22-27), the Supreme Court held that the Safety Appliance Act of March 2, 1893, embraced all locomotives, cars and similar vehicles used on any railroad that is a highway of interstate commerce, and is not confined exclusively to vehicles engaged in such commerce, and therefore where interstate and intrastate commerce are commingled in transportation over highways of interstate commerce, that trains and cars on the same railroad, whether engaged in one form of traffic or the other, are interdependent, and that absence of safety appliances from any part of a train is a menace not only to that train but others. The Court therefore upheld a conviction of a railroad for failure to comply with the Safety Appliance Act of Congress, although the cars from which the appliance was absent were cars engaged solely in intrastate commerce, but placed in a train also moving interstate commerce cars.

The Circuit Court of Appeals while acknowledging that the intrastate character of the train which struck the plaintiff was immaterial, nevertheless at the close of its opinion (p. 88, fol. 40), said: "In getting rivets for the bridge he (plaintiff) went upon the main eastbound track where he was struck and injured by a local and intrastate train coming in the other direction. Under such facts it is clear that neither by operating such local train, or by building an additional track or bridge, or by sending the man for the rivets was the carrier 'engaged in commerce between any of the several States.'"

We have stated under Point One, *supra*, the facts showing that at the time of this accident the defendant was a common carrier by railroad engaging in commerce between several States. Specifically, it was operating interstate trains over the Duffield street bridge which was being repaired, and on his way to which with materials therefor, plaintiff was hurt. It was also operating interstate and local trains over the James avenue bridge, upon which plaintiff was hurt, and the accident happened because the passage of an interstate train bound west over that bridge required the plaintiff to get off of that track and on to the eastbound track, where he was hit by an eastbound train (p. 5 of this brief).

In and about the repairing of the Duffield street bridge and for interstate trains the defendant at the time of the accident was engaged in sending the bolts and rivets thereto needed thereon from its tool car through its yard and over its tracks by the plaintiff's labor and that of his co-worker Conrad, both of whom were to work that night or early the next morning upon repairs to said bridge by removing a girder thereof and putting in a new one in its place (p. 7 of this brief).

We have a case, therefore, where the defendant was repairing a bridge used then in its interstate commerce, and sent workmen thereto with material for such repair and to take part in such repair. It has been said in a case arising under this Act that the carrier is necessarily engaging in interstate commerce in every case in which its employee by its direction is engaged in such commerce. In the Colasurdo case, *supra*, it was said that the term "while engaging" in interstate commerce as applied to carriers includes their activities when they are engaging in such commerce by their own employees, and that if the employee was engaged in such commerce so was the carrier, for the road was the master, and the servant's act its act.

Colasurdo vs. Cent. R. R. of N. J.,
180 Fed., 832; aff'd 192 Fed., 901,
2nd Circuit.

This Court said in the Second Employers' Liability Cases that the power of Congress extends to instances where the injury to an interstate employee is caused by the negligence of an intrastate employee. Following and citing this view, the opinion of the Circuit Court of Appeals in the case at bar declares that the fact that the train inflicting the injury was an intrastate train is not material (pp. 85, 86, fol. 136, Record). These expressions of this Court and of the Court below necessarily carry with them a construction of the words declaring the carrier liable "while engaging" in interstate commerce. They both show that the source of the injury is of no materiality and that its effect upon interstate commerce is the criterion of liability. The words "while engaging" in commerce between States therefore relate merely to whether or not the carrier is at the time engaged in such commerce without regard to whether any act

or omission therein occasioned the injury. If the carrier railroad is engaging in interstate commerce, and employs persons in that commerce, it is made liable by this act for their injury by negligence of other servants in any branch of the carrier's business as well as by reason of any defects "due to its own negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment" without regard to whether or not such equipment was part of its instrumentalities for interstate commerce (Sec. 1, Act of April 22, 1908). There are no words in the Act limiting the liability of the carrier to cases where the negligence is that of its servants engaged in interstate commerce or to cases where the defects in its equipment exist only in its instrumentalities of such commerce.

It follows that it is the status of the employer, to wit, that of an interstate carrier, and the status of the employee, to wit, that of an interstate employee, *i. e.* one employed on the interstate highways or the equipment thereon which determines the applicability of the Act. It must be construed to mean that, while maintaining the relation of an employer engaging in interstate commerce to a person employed in such commerce, upon such highways or the equipment thereon, a carrier by railroad shall be liable to such person for personal injuries suffered by reason of negligence of any other employees in the same or in any other branch of the employer's service or by reason of defects due to the employer's negligence in any of the equipment used in the same or any other branch of the employer's business.

It is therefore respectfully submitted that the defendant was engaging in interstate commerce within the meaning of the Act at the time of the injuries to plaintiff.

POINT THREE.

The "engaging" by a railroad in interstate commerce and the employment in such commerce contemplated by the Act comprehends all its activities and instrumentalities upon the highway over which it conducts such commerce, and excludes all other activities and instrumentalities.

Difficulties have been suggested in several cases under this and other acts as to where the limit lies in determining what is interstate commerce and in determining what is employment in such commerce. Thus in the first Employers' Liability cases (207 U. S., 463), at page 498, Mr. Justice White said:

> "A few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce * * * having shops for repairs and it may be for construction work as well as a large accounting and clerical force and having, it may be, storage elevators and warehouses," &c.

In Penn. R. R. vs. Knight, 192 U. S., 21, Mr. Justice Brewer said:

> "If a cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation why is not the porter who carries the traveller's trunk from his room to the carriage also engaged? If the cab service is interstate transportation are the drivers of the cabs and the dealers

> who supply hay and grain for the horses also engaged in interstate commerce, and where will the limit be placed?"

Such difficulties being so suggested Congress by the present Act limited the liability to case of employees in interstate commerce injured while the carrier was engaging in such commerce. It is a fair inference that it was intended thereby to exclude those classes of employees and the conveniencies mentioned in the opinion of Mr. Justice White as aforesaid, and that this Court in declaring the present Act constitutioual must have regarded such as not within the purview of the Act, otherwise it would have been as defective, constitutionally, as was the prior Act.

In the case of Southern Ry. vs. U. S., 222 U. S., 22, this Court held that the Safety Appliance Act applied to all cars which were allowed to go upon the highways of interstate commerce whether for interstate or intrastate commerce. It is apparent that the interstate commerce power of Congress covers such highway and all its component parts as roadbed, bridges and tracks and also all rolling stock thereon and also covers all employees on said highway and such stock. But as soon as we leave such highway of commerce over which railroads run their cars we leave the domain of interstate commerce as far as the railroad is concerned under the terms of this Act.

This is a workingman's act intended to protect him and recompense him for personal injuries received on such highway and a construction of the Act by this Court limiting it to employees upon the trains and upon such highways and their component parts will be in accord with the intent of Congress as shown by the history of the legislation as well as by the terms of the Act itself.

POINT FOUR.

Cases construing the Act and supporting the views above set forth, follow.

Zikos vs. Oregon Nav. Co., 179 Fed., 893 (Circuit Court, Washington, E. D.).

A section hand working on repairs of a track over which both interstate and intrastate traffic was carried was injured by a defective implement. The Court said: "Since the track in the nature of things must be maintained for commerce between the States the work bestowed upon it inures to the benefit of such commerce. It is, therefore, subject to Federal control even though it may contribute to carriage wholly within the State."

Johnson vs. Great Northern Ry., 178 Fed., 643 (Circuit Ct. of Appeals, 8th Circuit).

Plaintiff, when injured, was engaged in connecting up the air hose upon a train of empty cars standing on a switch and destined for a point without the State. Plaintiff was not employed in the movement of trains but only as a yard man. The Court held that the defendant was engaged in interstate commerce in moving one of the cars which caused the injury, and that, therefore, the plaintiff was likewise engaged in such commerce.

Colasurdo vs. Cent. R. R. of N. J., 180 Fed., 832; affirmed 192 Fed., 901 (C. C. of Appeals, 2nd Circuit).

Plaintiff was a trackwalker and engaged in re-

pairing a switch in the railroad yard. The switch connected tracks used both in local and interstate traffic. An intrastate train injured the plaintiff while so at work. Held, that the repair of the switch involved the proposition that both the railroad and its employee were engaged in interstate commerce.

Darr vs. B. & O. Ry., 197 Fed., 665, (Dist. Ct. of Maryland).

Plaintiff was employed to make repairs upon trains arriving and awaiting the time for starting on return trip while standing on the tracks. While repairing a car of an interstate train he was injured through the negligence of a fellow-servant. Held, he was entitled to recover.

Lamphere vs. Oregon Ry., 196 Fed., 336 (C. C. A., 9th Circuit).

A locomotive fireman was ordered to report for duty on an interstate train. While passing through the defendant's yard on the way to his destination, he was struck and killed by cars of the defendant other than those to which he was assigned. The Court reversed the judgment below, and held that the case fell within the statute. In support of its decision the Court cited the Zikos case and the Colasurdo case, *supra*, and criticised the decision in the case at bar as counter to those cases and to the decision of this Court in the Second Employers' Liability Cases, 223 U. S., 1.

The Court also cited :

Behrens vs. Ills. Cent. R. R., 192 Fed., 581, where the Act was held to apply to the case of a fireman on a switching engine used for switching both interstate and intrastate commerce cars.

Snead vs. Cent. Ga. R. R., 151 Fed., 608,

a bridgeman at work repairing a bridge was held to be within the protection of the First Employer's Liability Act, and see

Carr vs. N. Y. Cent. R. R., 77 Misc. (N. Y.), 346, advance sheets, No. 615.

POINT FIVE.

It is therefore respectfully submitted that the judgement below was wrong, and should be reversed and that this Court should direct the Court below to enter judgment in favor of the plaintiff upon the verdict.

Dated January, 1913.

GEORGE BELL,
Attorney for Plaintiff-in-errror.

BENJAMIN PATTERSON,
Of Counsel.

No. 698.

October Term, 1912

IN THE

Supreme Court of the United States.

MARTIN PEDERSEN,

Plaintiff in Error.

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant in Error.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR DEFENDANT IN ERROR.

JAMES F. CAMPBELL,
Attorney for Defendant in Error.

WILLIAM S. JENNEY,
Of Counsel.

International, 234 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1912. No. 698.

MARTIN PEDERSEN,
Plaintiff in Error,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The facts are not accurately stated in brief of plaintiff in error.

Martin Pedersen, plaintiff in error, had been working for defendant in error for about three weeks as a laborer in and about the construction of a new bridge which was being erected by defendant company at West End, New Jersey. This bridge when completed was to carry defendant's tracks over those of another railroad company.

On the morning of the accident, hereinafter referred to, Pedersen with a co-employe named Conrad

was engaged in making a box for separating rivets, according to size (p. 8, fol. 14, Record, p. 38, fol. 59). After finishing this box about noon, Pedersen and Conrad were told by their foreman, Campbell, to go to a tool car some little distance away and there get rivets and carry them to Duffield Street, where the company was putting in a "Y" and where the next morning at five o'clock, work was going to start in taking out a bridge girder and replacing it with a new one (p. 9, fol. 14, p. 26, fol. 42, p. 27, fol. 43, p. 38, fols. 59-60).

After obtaining their supply of rivets from the tool car, Pedersen and Conrad proceeded up the track towards the Duffield Street bridge. Pedersen having stopped to get a drink, Conrad was some distance ahead; the latter observing a train coming from the east, which afterwards turned out to be a train bound for Buffalo, called Pedersen's attention to it, who then got off the west bound track and proceeded to walk westerly on the east bound track and was shortly afterwards struck and injured by a train of defendant company running from Mont Clair to Jersey City, both in the state of New Jersey.

The lower court held, in entering judgment for the defendant *non obstante veredicto,* that without deciding whether or not Pedersen was employed in interstate commerce, he could not claim the benefit of the *Federal Employer's Liability Act,* because the railroad company was not engaged in interstate commerce when operating the intrastate train from Mont Clair to Jersey City, which train caused the injuries to Pedersen.

The Circuit Court of Appeals for the Third Circuit in affirming the judgment of the court below, held that Pedersen was not employed in interstate commerce and was therefore not entitled to the benefit of the act.

ARGUMENT.

An attempt is made in this case to stretch to the utmost limit the scope of the *Federal Employer's Liability Act* as to what employees of a railroad company are entitled to its benefits.

It is, of course, conceded that the defendant in error is engaged in both interstate and intrastate commerce, and that its track and roadbed are used indiscriminately in such commerce; and that the new tracks and bridges which are hereinafter spoken of, were to be so used, but it is strenuously denied that all of the thousands of its employees are employed in interstate commerce, or come within the purview of the *Federal Employer's Liability Act.*

Remembering the testimony that Pedersen, the plaintiff in error, for several weeks prior to his injuries had been working about an entirely new bridge over which trains had never been operated and that on the day of the accident had been employed in making a box to separate rivets, and after finishing that work, he and his co-worker, Conrad, were ordered to go to a tool car and obtain some bolts and rivets and take them to a place where they were to be used the next morning, and while on their way to that place Pedersen was injured by an intrastate train, it is hard to see from any view point that he was then being employed in interstate commerce or even commerce at all.

Pedersen had nothing at all to do with transportation, but was merely a helper in and about the building of new bridges or the repair of old ones; he had nothing to do with the operation of trains; the repair or maintenance of track or cars or anything in connection with intercourse between the states.

If Pedersen comes within the terms of the act then practically every other employe of a railroad

does, no matter how remote their services may be in connection with interstate commerce

One of the chief objections to the act of 1906, which was declared unconstitutional in the *Employer's Liability Cases* (207 U. S. 463), was that it included employees who were not actually employed in interstate commerce. This point was covered by what was said by the now *Chief Justice* on page 498, of the majority opinion:

> "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, *without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury,* of necessity includes subjects outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, *also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce,* a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state, take again the same railroad, having shops for repairs, *and it may be, for construction work,* as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, beside, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as an interstate business. Take a trolley line moving wholly within a state as to a large part of its business and yet, as to the remainder, crossing the state line.

> "As the act thus includes many subjects (p. 499) wholly beyond the powers to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution and cannot be enforced unless there be merit in the proposition advanced to show that the statute may be saved." (Italics ours.)

The principal dissenting opinion was written by Mr. Justice Moody, but he conceded that, if the true interpretation of the statute embraced employees who were engaged in work that had no relation to interstate commerce, Congress had overstepped its power. The whole court were agreed upon this, he said; and the principal ground of his dissent was, that the statute properly interpreted afforded a remedy (p. 519) "only to employees of foreign, interstate and territorial carriers, who are themselves engaged in some capacity in such commerce in some of its manifold aspects." Mr. Justice Harlan and Mr. Justice McKenna, declared (p. 540) that:

> "The act reasonably and properly interpreted applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce, and to employees who at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred."

And Mr. Justice Holmes stated his view to be (p. 541) that

> "The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows."

Unquestionably there was therefore in the minds of this court, a class of railroad employees who were

not employed in interstate commerce and who were included in the terms of the act of 1906, making it unconstitutional.

Just what employees are included in the act of 1908, has not as yet been passed upon by this court, but that in order to be entitled to the benefits of the act, their employment must have a real and substantial connection with interstate commerce was held in the *Second Employer's Liability Cases* (223 U. S. 1).

Now was there anything real or substantial in Pedersen's employment in connection with interstate commerce that would include him within the terms of the act? He had nothing whatever to do with operation of trains; nor with anything in connection with intercourse or traffic; nor with tracks, roadbed or the other instrumentalities of commerce. He was a laborer in and about the construction of a new bridge or carrying supplies that were to be used in the repair or remodeling of an old one. The mere fact that he was using the railroad track as a path to go to or from his work certainly would not make him engaged in commerce, or the fact that his carrying bolts or rivets which were to be used in the construction of a railroad bridge, give him any real or substantial connection with interstate commerce, traffic or intercourse.

> "Commerce is a term of the largest import. It comprehends *intercourse* for the purpose of trade in any and all its terms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries and between the citizens of different states."
>
> *Welton vs. Missouri,* 91 U. S. 275.

> "Transportation of merchandise is essential to commerce, or rather, it is commerce itself."
>
> *P. & R. R. Co. vs. Penna.,* 15 Wall. 232.

"Commerce includes intercourse and navigation as well as interchange of goods."

New York vs. Miln, 11 Peters, 102.

"Commerce consists of the transportation of persons and property, as well as the purchase, sale, and exchange of commodities, *but does not include the manufacture of such commodities.*"

Kidd vs. Pearson, 128 U. S. 1.

Mr. Justice Lamar in the opinion of the above case, said at pages 20-21:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation.

"The legal definition of the term, as given by this court in County of Mobile vs. Kimball, 102 U. S. 691, is as follows: 'Commerce with foreign nations and among the states, strictly considered, *consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.*' If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining, in short,

every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management.

"It is not necessary to enlarge on but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved and the almost infinite variety of their minute details."

"While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental, or even in one sense are essential to interstate commercial intercourse."

Judson on Interstate Commerce, Sec. 7.

"The term 'Commerce' is not defined in the Constitution, but its meaning has been determined by the process of judicial inclusion and exclusion on the broad and comprehensive basis laid down in Gibbons vs. Ogden. Commerce, it was there said, is not traffic alone, it is intercourse."

Judson on Interstate Commerce, Sec. 6.

"Commerce may be shortly defined as that intercourse and traffic which has to do with the exchange of commodities. 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of one

country and the citizens or subjects of other countries, and between the citizens of different states."

7 Cyc., 413.

"Commerce, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of property and persons as well as the purchase, sale and barter of commodities, and agreements therefor."

7 Cyc., 413.

It is submitted, therefore, giving the act its proper construction, that it means that the employee must be engaged in commerce; that is, traffic or intercourse between the states, and an employee not engaged in transportation, traffic or intercourse between the states is certainly not engaged in commerce. Of course it is conceded that Congress has power under the Commerce Clause, to regulate the instrumentalities of Commerce; the cars the tracks, the signals, the hours of service of employees, etc., but in the act in question, it distinctly and positively says that the employee *must be engaged in commerce,* not as in the Safety Appliance Acts, about cars which are moved in interstate commerce, but in commerce itself. If Congress meant to take care of employees not engaged in traffic or commerce, but simply about the instrumentalities of commerce, it should so have said, but it is strenuously urged that, even giving the words of the act their broadest significance, it has no such meaning.

This thought is pointed out in 7 Cyc. 414, where it is said:

"The real distinction between acts and subjects of commerce and those that are not, consists in the difference between commerce or an instrumentality thereof on the one side and the mere in-

cidents which may attend the carrying on of such commerce on the other." Citing

> Hooper vs. California, 155 U. S. 648;
> Williams vs. Fears, 179 U. S. 270.

The distinction, therefore, is between *Acts* of commerce and *Subjects* of commerce.

Subjects of Commerce, include anything that may be transported and the instrumentalities thereof.

In the Employer's Liability Act it is submitted that the terms "engaging in commerce" and "employed in such commerce" mean engaged in traffic, intercourse, etc.

Railroad companies in this country, except in a few instances, are creatures of a state and under the direct supervision of the state except as to those matters of interstate commerce upon which Congress has legislated.

In the case at bar, Pedersen, the plaintiff, was engaged about some construction work, that is, manufacturing something new, although it is true such creation or result was afterwards to be used as a means whereby interstate commerce was to be carried on. That these acts are not such interstate commerce as is contemplated by the act is plainly seen from the following cases:

In *United States vs. E. C. Knight Co.,* 156 U. S. 1, Mr. Chief Justice Fuller in his opinion said:

> "Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. *Commerce succeeds to manufacture, and is not a part of it.*

> "The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the articles or product passes from the control of the state and belongs to commerce."

In *Interstate Commerce Commission vs. Detroit, &c., R. Co.,* 167 U. S. 633, it was held that:

> "The gathering of freight from the place of business of shippers and distributing freight to such place of business by vehicles employed by the carrier, does not necessarily make the carriage between such place of business and the freight station of the carrier a part of an interstate journey."

In *New York, ex rel., Penn. R. R. vs. Knight,* 192 U. S. 21, Mr. Justice Brewer said:

> "If a cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also engaged? If the car service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses, also engaged in interstate commerce, and where will the limit be placed? *We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any transportation.*"

From a perusal of the above definitions of commerce and the cases cited, we come to the crux of this case, and that is whether Pedersen was employed in interstate commerce when his duties were merely in connection with manufacturing or helping to manufacture something which was in the future to be used as a means whereby interstate traffic could be carried on. If Pedersen is considered to be so engaged, why

is not the man chopping down trees in the forest in order to make railroad ties equally employed in interstate commerce, or even the miner working in mines to furnish the railroad with coal, which is to be used on its interstate engines, so engaged? It certainly was not the thought of Congress in this legislation to include any such employees. It was said in the *Second Employer's Liability Cases,* (supra) that the employe must have a real and substantial connection with interstate commerce, that is, with transportation, and it is submitted that Pedersen cannot in any way be so included.

Great stress seems to be laid in the brief of plaintiff in error upon the case of *Southern Ry. Co. vs. United States,* 222 U. S. 20, but his argument misses the distinction between the regulation of an instrumentality which is used in interstate commerce and the granting of a remedy for an injury received in interstate commerce, and the latter purpose was the only one contemplated by the act of 1908. Congress has, of course, a right to regulate and legislate upon the instrumentalities of commerce or of employees engaged about them, but the act we are considering says nothing except that the employee is entitled to the benefits of the act only when he is engaged in interstate commerce, that is interstate transportation and it is the contention of defendant in error that Pedersen was not engaged in such commerce in any sense of the term as used in the act.

CASES IN FEDERAL COURTS DECIDING WHAT EMPLOYES COME UNDER THE ACT.

Taylor vs. Southern Railway Company, 178 Fed. 380 (Circuit N. D. Ga.):

In this case it was held that a member of a bridge gang, engaged in repairing bridges, did not come under the act. Judge Newman, in his opinion, saying:

"I do not know how far this Employer's Liability Act will be extended as to the class of employees; but it seems reasonably clear to me that a man engaged in repairing bridges and doing bridge work generally, even though he worked in different states for the railroad company, is not engaged in interstate commerce within the meaning of the act."

Johnson vs. Great Northern Railway Co., 178 Fed. 643 (C. C. A., Eighth Circuit), holds:

"An employee of a railroad company, charged with the duty of seeing to the coupling of cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which were being used in interstate commerce, was being employed in interstate commerce, and was within the provisions of the Employer's Liability Act."

Zikos vs. Oregon R. & Navigation Co., 179 Fed. 893 (Circuit E. D. Washington), holds that a section hand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in interstate commerce. Judge Whitson saying in his opinion at page 898:

"No doubt there may be situations, indeed we have the highest authority for it (Employer's Liability Cases, supra, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297) when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic, where there could be no ground for claiming liability under the act of Congress, even though the carier in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at

all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

Colasurdo vs. Central R. R. of New Jersey, 180 Fed. 832, affirmed in 192 Fed. p. 901 (Circuit Court, S. D. N. Y.). It was held that

"where a railroad trackman was injured while repairing a switch in defendant's terminal yards at night, over which interstate as well as intrastate commerce was continually transported, and the car by which he was struck was being kicked into the station platform at defendant's Jersey City terminal to carry passengers coming on one of defendant's ferryboats from New York to a point in New Jersey, plaintiff was engaged in interstate commerce."

Van Brimmer vs. Texas & P. Railway Co., 190 Fed. 394 (Circuit E. D. Texas), it was held that

"where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, his injury did not occur while he was engaged in interstate commerce."

Behrens vs. Illinois Central Railroad Co., 192 Fed. 581, it was held that

> "where intestate, a fireman on one of defendant's switch engines, was ordinarily employed in interstate commerce, though mingled with employment in commerce wholly within the state, he was engaged in interstate commerce within the Federal Employer's Liability Act."

Lamphere vs. Oregon R. & Navigation Co., 196 Fed. 336 (C. C. A., Ninth Circuit), holds that

> "A locomotive fireman in the employment of a railroad company, engaged in interstate commerce, who was ordered by his superior to report at a station to be transferred with others to another station, to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants also operating an interstate train, was employed in interstate commerce within the meaning of the act."

Bennett vs. Lehigh Valley Railroad Co. (District Court E. D. Pa.) 197 Fed. 578, holds that

> "An employee of a railroad company, engaged in interstate commerce, who was killed in a collision while riding to his home by permission, on one of the company's trains, and who was not at the time and so far as appeared, had not just previously been employed in interstate commerce, was not within the Employer's Liability Act."

Heimbach vs. Lehigh Valley Railroad Co., 197 Fed. 579 (District Court E. D. Pa.), holds that

> "Employees of a railroad company, injured while repairing a car of another company, which had reached the end of its run, been unloaded and was lying at the station awaiting orders, were not at the time employed in interstate commerce."

Feaster vs. Phila. & Read. Rwy. Co., 197 Fed. 580 (District Court E. D. Pa.), holds that

> "An extra conductor in the employ of a railroad company, directed on reporting for work to ride to another point, within the same state, for services on a work train, and who was injured while proceeding to his train, was not at the time employed in interstate commerce."

Northern Pac. Rwy. Co. vs. Maerkl, 198 Fed. 1, (C. C. A., Ninth Circuit), holds that:

> "Where an employee of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce, as occasion required, defendant was at the time 'engaged in interstate commerce and the employé was employed by defendant in such commerce, within the meaning of the Employers' Liability Act of 1908."

An examination of the above authorities will show that in every case where a recovery was allowed under the act, the railroad employee had some direct connection with interstate commerce, either as part of a crew upon a train engaged in interstate commerce, or about the tracks and switches which were in active use in conducting interstate commerce, but in the case at bar Pedersen was engaged merely in duties tending towards the manufacturing of something which was afterwards to be used in interstate commerce and therefore his connection is entirely too remote to be covered by the act.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

JAMES F. CAMPBELL,
Attorney for Defendant in Error.

WILLIAM S. JENNEY,
Of Counsel.

5

No. 698. October Term, 1912.

IN THE

Supreme Court of the United States.

MARTIN PEDERSEN,

Plaintiff in Error,

vs.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,

Defendant in Error.

Writ of Error to the United States Circuit Court of Appeals for the Third Circuit.

BRIEF FOR DEFENDANT IN ERROR.

JAMES F. CAMPBELL,
Attorney for Defendant in Error.

WILLIAM S. JENNEY,
Of Counsel.

International, 236 Chestnut St.

IN THE

Supreme Court of the United States.

October Term, 1912. No. 698.

MARTIN PEDERSEN,
Plaintiff in Error,
vs.
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
Defendant in Error.

WRIT OF ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANT IN ERROR.

COUNTER STATEMENT OF THE CASE.

The facts are not accurately stated in brief of plaintiff in error.

Martin Pedersen, plaintiff in error, had been working for defendant in error for about three weeks as a laborer in and about the construction of a new bridge which was being erected by defendant company at West End, New Jersey. This bridge when completed was to carry defendant's tracks over those of another railroad company.

On the morning of the accident, hereinafter referred to, Pedersen with a co-employe named Conrad

was engaged in making a box for separating rivets, according to size (p. 8, fol. 14, Record, p. 38, fol. 59). After finishing this box about noon, Pedersen and Conrad were told by their foreman, Campbell, to go to a tool car some little distance away and there get rivets and carry them to Duffield Street, where the company was putting in a "Y" and where the next morning at five o'clock, work was going to start in taking out a bridge girder and replacing it with a new one (p. 9, fol. 14, p. 26, fol. 42, p. 27, fol. 43, p. 38, fols. 59-60).

After obtaining their supply of rivets from the tool car, Pedersen and Conrad proceeded up the track towards the Duffield Street bridge. Pedersen having stopped to get a drink, Conrad was some distance ahead; the latter observing a train coming from the east, which afterwards turned out to be a train bound for Buffalo, called Pedersen's attention to it, who then got off the west bound track and proceeded to walk westerly on the east bound track and was shortly afterwards struck and injured by a train of defendant company running from Mont Clair to Jersey City, both in the state of New Jersey.

The lower court held, in entering judgment for the defendant *non obstante veredicto,* that without deciding whether or not Pedersen was employed in interstate commerce, he could not claim the benefit of the *Federal Employer's Liability Act,* because the railroad company was not engaged in interstate commerce when operating the intrastate train from Mont Clair to Jersey City, which train caused the injuries to Pedersen.

The Circuit Court of Appeals for the Third Circuit in affirming the judgment of the court below, held that Pedersen was not employed in interstate commerce and was therefore not entitled to the benefit of the act.

ARGUMENT.

An attempt is made in this case to stretch to the utmost limit the scope of the *Federal Employer's Liability Act* as to what employees of a railroad company are entitled to its benefits.

It is, of course, conceded that the defendant in error is engaged in both interstate and intrastate commerce, and that its track and roadbed are used indiscriminately in such commerce; and that the new tracks and bridges which are hereinafter spoken of, were to be so used, but it is strenuously denied that all of the thousands of its employees are employed in interstate commerce, or come within the purview of the *Federal Employer's Liability Act.*

Remembering the testimony that Pedersen, the plaintiff in error, for several weeks prior to his injuries had been working about an entirely new bridge over which trains had never been operated and that on the day of the accident had been employed in making a box to separate rivets, and after finishing that work, he and his co-worker, Conrad, were ordered to go to a tool car and obtain some bolts and rivets and take them to a place where they were to be used the next morning, and while on their way to that place Pedersen was injured by an intrastate train, it is hard to see from any view point that he was then being employed in interstate commerce or even commerce at all.

Pedersen had nothing at all to do with transportation, but was merely a helper in and about the building of new bridges or the repair of old ones; he had nothing to do with the operation of trains; the repair or maintenance of track or cars or anything in connection with intercourse between the states.

If Pedersen comes within the terms of the act then practically every other employe of a railroad

does, no matter how remote their services may be in connection with interstate commerce

One of the chief objections to the act of 1906, which was declared unconstitutional in the *Employer's Liability Cases* (207 U. S. 463), was that it included employees who were not actually employed in interstate commerce. This point was covered by what was said by the now *Chief Justice* on page 498, of the majority opinion:

> "The act, then, being addressed to all common carriers engaged in interstate commerce, and imposing a liability upon them in favor of any of their employees, *without qualification or restriction as to the business in which the carriers or their employees may be engaged at the time of the injury,* of necessity includes subjects outside of the power of Congress to regulate commerce. Without stopping to consider the numerous instances where although a common carrier is engaged in interstate commerce, such carrier may, in the nature of things, *also transact business not interstate commerce, although such local business may indirectly be related to interstate commerce,* a few illustrations showing the operation of the statute as to matters wholly independent of interstate commerce will serve to make clear the extent of the power which is exerted by the statute. Take a railroad engaged in interstate commerce, having a purely local branch operated wholly within a state, take again the same railroad, having shops for repairs, *and it may be, for construction work,* as well as a large accounting and clerical force, and having, it may be, storage elevators and warehouses, not to suggest, beside, the possibility of its being engaged in other independent enterprises. Take a telegraph company engaged in the transmission of interstate and local messages. Take an express company engaged in local as well as an interstate business. Take a trolley line moving wholly within a state as to a large part of its business and yet, as to the remainder, crossing the state line.

> "As the act thus includes many subjects (p. 499) wholly beyond the powers to regulate commerce, and depends for its sanction upon that authority, it results that the act is repugnant to the Constitution and cannot be enforced unless there be merit in the proposition advanced to show that the statute may be saved." (Italics ours.)

The principal dissenting opinion was written by Mr. Justice Moody, but he conceded that, if the true interpretation of the statute embraced employees who were engaged in work that had no relation to interstate commerce, Congress had overstepped its power. The whole court were agreed upon this, he said; and the principal ground of his dissent was, that the statute properly interpreted afforded a remedy (p. 519) "only to employees of foreign, interstate and territorial carriers, who are themselves engaged in some capacity in such commerce in some of its manifold aspects." Mr. Justice Harlan and Mr. Justice McKenna, declared (p. 540) that:

> "The act reasonably and properly interpreted applies, and should be interpreted as intended by Congress to apply, only to cases of interstate commerce, and to employees who at the time of the particular wrong or injury complained of, are engaged in such commerce, and not to domestic commerce or commerce completely internal to the state in which the wrong or injury occurred."

And Mr. Justice Holmes stated his view to be (p. 541) that

> "The phrase 'every common carrier engaged in trade or commerce' may be construed to mean 'while engaged in trade or commerce' without violence to the habits of English speech, and to govern all that follows."

Unquestionably there was therefore in the minds of this court, a class of railroad employees who were

not employed in interstate commerce and who were included in the terms of the act of 1906, making it unconstitutional.

Just what employees are included in the act of 1908, has not as yet been passed upon by this court, but that in order to be entitled to the benefits of the act, their employment must have a real and substantial connection with interstate commerce was held in the *Second Employer's Liability Cases* (223 U. S. 1).

Now was there anything real or substantial in Pedersen's employment in connection with interstate commerce that would include him within the terms of the act? He had nothing whatever to do with operation of trains; nor with anything in connection with intercourse or traffic; nor with tracks, roadbed or the other instrumentalities of commerce. He was a laborer in and about the construction of a new bridge or carrying supplies that were to be used in the repair or remodeling of an old one. The mere fact that he was using the railroad track as a path to go to or from his work certainly would not make him engaged in commerce, or the fact that his carrying bolts or rivets which were to be used in the construction of a railroad bridge, give him any real or substantial connection with interstate commerce, traffic or intercourse.

> "Commerce is a term of the largest import. It comprehends *intercourse* for the purpose of trade in any and all its terms, including the transportation, purchase, sale, and exchange of commodities between the citizens of our country and the citizens or subjects of other countries and between the citizens of different states."
>
> *Welton vs. Missouri,* 91 U. S. 275.

> "Transportation of merchandise is essential to commerce, or rather, it is commerce itself."
>
> *P. & R. R. Co. vs. Penna.,* 15 Wall. 232.

"Commerce includes intercourse and navigation as well as interchange of goods."

New York vs. Miln, 11 Peters, 102.

"Commerce consists of the transportation of persons and property, as well as the purchase, sale, and exchange of commodities, *but does not include the manufacture of such commodities.*"

Kidd vs. Pearson, 128 U. S. 1.

Mr. Justice Lamar in the opinion of the above case, said at pages 20-21:

"No distinction is more popular to the common mind, or more clearly expressed in economic and political literature, than that between manufacturers and commerce. Manufacture is transformation—the fashioning of raw materials into a change of form for use. The functions of commerce are different. The buying and selling and the transportation incidental thereto constitute commerce; and the regulation of commerce in the constitutional sense embraces the regulation at least of such transportation.

"The legal definition of the term, as given by this court in County of Mobile vs. Kimball, 102 U. S. 691, is as follows: 'Commerce with foreign nations and among the states, strictly considered, *consists in intercourse and traffic, including in these terms navigation and the transportation and transit of persons and property, as well as the purchase, sale, and exchange of commodities.*' If it be held that the term includes the regulation of all such manufacturers as are intended to be the subject of commercial transactions in the future, it is impossible to deny that it would also include all productive industries that contemplate the same thing. The result would be that Congress would be invested, to the exclusion of the states, with the power to regulate, not only manufacture, but also agriculture, horticulture, stock raising, domestic fisheries, mining, in short,

every branch of human industry. For is there one of them that does not contemplate, more or less clearly, an interstate or foreign market? Does not the wheat-grower of the Northwest, and the cotton planter of the South, plant, cultivate, and harvest his crop with an eye on the prices at Liverpool, New York, and Chicago? The power being vested in Congress and denied to the states, it would follow as an inevitable result that the duty would devolve on Congress to regulate all of these delicate, multiform, and vital interests—interests which in their nature are, and must be, local in all the details of their successful management.

"It is not necessary to enlarge on but only to suggest, the impracticability of such a scheme, when we regard the multitudinous affairs involved and the almost infinite variety of their minute details."

"While commerce is more than traffic and includes commercial intercourse and the transmission of intelligence, it does not include the contractual relations between citizens of different states, which are incidental, or even in one sense are essential to interstate commercial intercourse."

Judson on Interstate Commerce, Sec. 7.

"The term 'Commerce' is not defined in the Constitution, but its meaning has been determined by the process of judicial inclusion and exclusion on the broad and comprehensive basis laid down in Gibbons vs. Ogden. Commerce, it was there said, is not traffic alone, it is intercourse."

Judson on Interstate Commerce, Sec. 6.

"Commerce may be shortly defined as that intercourse and traffic which has to do with the exchange of commodities. 'Commerce' is a term of the largest import. It comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of one

country and the citizens or subjects of other countries, and between the citizens of different states."

7 Cyc., 413.

"Commerce, strictly considered, consists in intercourse and traffic, including in these terms navigation and the transportation and transit of property and persons as well as the purchase, sale and barter of commodities, and agreements therefor."

7 Cyc., 413.

It is submitted, therefore, giving the act its proper construction, that it means that the employee must be engaged in commerce; that is, traffic or intercourse between the states, and an employee not engaged in transportation, traffic or intercourse between the states is certainly not engaged in commerce. Of course it is conceded that Congress has power under the Commerce Clause, to regulate the instrumentalities of Commerce; the cars the tracks, the signals, the hours of service of employees, etc., but in the act in question, it distinctly and positively says that the employee *must be engaged in commerce,* not as in the Safety Appliance Acts, about cars which are moved in interstate commerce, but in commerce itself. If Congress meant to take care of employees not engaged in traffic or commerce, but simply about the instrumentalities of commerce, it should so have said, but it is strenuously urged that, even giving the words of the act their broadest significance, it has no such meaning.

This thought is pointed out in 7 Cyc. 414, where it is said:

"The real distinction between acts and subjects of commerce and those that are not, consists in the difference between commerce or an instrumentality thereof on the one side and the mere in-

cidents which may attend the carrying on of such commerce on the other." Citing

> Hooper vs. California, 155 U. S. 648;
> Williams vs. Fears, 179 U. S. 270.

The distinction, therefore, is between *Acts* of commerce and *Subjects* of commerce.

Subjects of Commerce, include anything that may be transported and the instrumentalities thereof.

In the Employer's Liability Act it is submitted that the terms "engaging in commerce" and "employed in such commerce" mean engaged in traffic, intercourse, etc.

Railroad companies in this country, except in a few instances, are creatures of a state and under the direct supervision of the state except as to those matters of interstate commerce upon which Congress has legislated.

In the case at bar, Pedersen, the plaintiff, was engaged about some construction work, that is, manufacturing something new, although it is true such creation or result was afterwards to be used as a means whereby interstate commerce was to be carried on. That these acts are not such interstate commerce as is contemplated by the act is plainly seen from the following cases:

In *United States vs. E. C. Knight Co.,* 156 U. S. 1, Mr. Chief Justice Fuller in his opinion said:

> "Doubtless the power to control the manufacture of a given thing involves, in a certain sense, the control of its disposition, but this is a secondary, and not the primary, sense; and, although the exercise of that power may result in bringing the operation of commerce into play, it does not control it, and affects it only incidentally and indirectly. *Commerce succeeds to manufacture, and is not a part of it.*

"The fact that an article is manufactured for export to another state does not of itself make it an article of interstate commerce, and the intent of the manufacturer does not determine the time when the articles or product passes from the control of the state and belongs to commerce."

In *Interstate Commerce Commission vs. Detroit, &c., R. Co.*, 167 U. S. 633, it was held that:

"The gathering of freight from the place of business of shippers and distributing freight to such place of business by vehicles employed by the carrier, does not necessarily make the carriage between such place of business and the freight station of the carrier a part of an interstate journey."

In *New York, ex rel., Penn. R. R. vs. Knight*, 192 U. S. 21, Mr. Justice Brewer said:

"If a cab which carries the passengers from the hotel to the ferry landing is engaged in interstate transportation, why is not the porter who carries the traveler's trunk from his room to the carriage also engaged? If the car service is interstate transportation, are the drivers of the cabs and the dealers who supply hay and grain for the horses, also engaged in interstate commerce, and where will the limit be placed? *We are of the opinion that the cab service is an independent local service, preliminary or subsequent to any transportation.*"

From a perusal of the above definitions of commerce and the cases cited, we come to the crux of this case, and that is whether Pedersen was employed in interstate commerce when his duties were merely in connection with manufacturing or helping to manufacture something which was in the future to be used as a means whereby interstate traffic could be carried on. If Pedersen is considered to be so engaged, why

is not the man chopping down trees in the forest in order to make railroad ties equally employed in interstate commerce, or even the miner working in mines to furnish the railroad with coal, which is to be used on its interstate engines, so engaged? It certainly was not the thought of Congress in this legislation to include any such employees. It was said in the *Second Employer's Liability Cases,* (supra) that the employe must have a real and substantial connection with interstate commerce, that is, with transportation, and it is submitted that Pedersen cannot in any way be so included.

Great stress seems to be laid in the brief of plaintiff in error upon the case of *Southern Ry. Co. vs. United States,* 222 U. S. 20, but his argument misses the distinction between the regulation of an instrumentality which is used in interstate commerce and the granting of a remedy for an injury received in interstate commerce, and the latter purpose was the only one contemplated by the act of 1908. Congress has, of course, a right to regulate and legislate upon the instrumentalities of commerce or of employees engaged about them, but the act we are considering says nothing except that the employee is entitled to the benefits of the act only when he is engaged in interstate commerce, that is interstate transportation and it is the contention of defendant in error that Pedersen was not engaged in such commerce in any sense of the term as used in the act.

CASES IN FEDERAL COURTS DECIDING WHAT EMPLOYES COME UNDER THE ACT.

Taylor vs. Southern Railway Company, 178 Fed. 380 (Circuit N. D. Ga.):

In this case it was held that a member of a bridge gang, engaged in repairing bridges, did not come under the act. Judge Newman, in his opinion, saying:

"I do not know how far this Employer's Liability Act will be extended as to the class of employees; but it seems reasonably clear to me that a man engaged in repairing bridges and doing bridge work generally, even though he worked in different states for the railroad company, is not engaged in interstate commerce within the meaning of the act."

Johnson vs. Great Northern Railway Co., 178 Fed. 643 (C. C. A., Eighth Circuit), holds:

"An employee of a railroad company, charged with the duty of seeing to the coupling of cars and of the air brake pipes upon cars standing upon a switch track to be transferred to another company, some of which were being used in interstate commerce, was being employed in interstate commerce, and was within the provisions of the Employer's Liability Act."

Zikos vs. Oregon R. & Navigation Co., 179 Fed. 893 (Circuit E. D. Washington), holds that a section hand working on the track of a railroad over which both interstate and intrastate traffic is moved is employed in interstate commerce. Judge Whitson saying in his opinion at page 898:

"No doubt there may be situations, indeed we have the highest authority for it (Employer's Liability Cases, supra, 207 U. S. 495, 28 Sup. Ct. 141, 52 L. Ed. 297) when instrumentalities that may be used for interstate or intrastate traffic, or both, but which at the time are not being used for either, as when engines or cars are undergoing repair, or in cases of clerical work when the acts or things done are not physically or otherwise directly connected with the moving of traffic,. where there could be no ground for claiming liability under the act of Congress, even though the carier in fact be engaged in interstate as well as local traffic. But where the employment necessarily and directly contributes to the more extended use and without which interstate traffic could not be carried on at

all, no reason appears for denying the power over the one, although it may indirectly contribute to the other. The particular question is an apt illustration of the intricacies to which our dual system of government often leads; but the intricacy is but an incident, and it can neither defeat nor impair the power of Congress over interstate commerce. Since the track, in the nature of things, must be maintained for commerce between the states, the work bestowed upon it inures to the benefit of such commerce. It is therefore subject to federal control, even though it may contribute to carriage wholly within the state. Being inseparable, yet interstate commerce inherently abiding in the thing to be regulated, as to the track, the state jurisdiction must give way, or at least it cannot defeat the superior power of Congress over the subject-matter whenever a carrier is using the track for the double purpose."

Colasurdo vs. Central R. R. of New Jersey, 180 Fed. 832, affirmed in 192 Fed. p. 901 (Circuit Court, S. D. N. Y.). It was held that

"where a railroad trackman was injured while repairing a switch in defendant's terminal yards at night, over which interstate as well as intrastate commerce was continually transported, and the car by which he was struck was being kicked into the station platform at defendant's Jersey City terminal to carry passengers coming on one of defendant's ferryboats from New York to a point in New Jersey, plaintiff was engaged in interstate commerce."

Van Brimmer vs. Texas & P. Railway Co., 190 Fed. 394 (Circuit E. D. Texas), it was held that

"where a railroad brakeman was injured while engaged in making a flying switch to set out a car transported wholly in intrastate traffic, though it was a part of the train carrying both interstate and intrastate freight, his injury did not occur while he was engaged in interstate commerce."

Behrens vs. Illinois Central Railroad Co., 192 Fed. 581, it was held that

> "where intestate, a fireman on one of defendant's switch engines, was ordinarily employed in interstate commerce, though mingled with employment in commerce wholly within the state, he was engaged in interstate commerce within the Federal Employer's Liability Act."

Lamphere vs. Oregon R. & Navigation Co., 196 Fed. 336 (C. C. A., Ninth Circuit), holds that

> "A locomotive fireman in the employment of a railroad company, engaged in interstate commerce, who was ordered by his superior to report at a station to be transferred with others to another station, to relieve the crew of an interstate train, and who, when approaching the station over a crossing, was struck and killed through the negligence of other servants also operating an interstate train, was employed in interstate commerce within the meaning of the act."

Bennett vs. Lehigh Valley Railroad Co. (District Court E. D. Pa.) 197 Fed. 578, holds that

> "An employee of a railroad company, engaged in interstate commerce, who was killed in a collision while riding to his home by permission, on one of the company's trains, and who was not at the time and so far as appeared, had not just previously been employed in interstate commerce, was not within the Employer's Liability Act."

Heimbach vs. Lehigh Valley Railroad Co., 197 Fed. 579 (District Court E. D. Pa.), holds that

> "Employees of a railroad company, injured while repairing a car of another company, which had reached the end of its run, been unloaded and was lying at the station awaiting orders, were not at the time employed in interstate commerce."

Feaster vs. Phila. & Read. Rwy. Co., 197 Fed. 580 (District Court E. D. Pa.), holds that

> "An extra conductor in the employ of a railroad company, directed on reporting for work to ride to another point, within the same state, for services on a work train, and who was injured while proceeding to his train, was not at the time employed in interstate commerce."

Northern Pac. Rwy. Co. vs. Maerkl, 198 Fed. 1, (C. C. A., Ninth Circuit), holds that:

> "Where an employee of defendant, an interstate railroad company, was injured, in part through the negligence of a fellow servant when working in repair shops connected with an interstate track, engaged in repairing a car used by defendant indiscriminately in both interstate and intrastate commerce, as occasion required, defendant was at the time 'engaged in interstate commerce and the employé was employed by defendant in such commerce, within the meaning of the Employers' Liability Act of 1908."

An examination of the above authorities will show that in every case where a recovery was allowed under the act, the railroad employee had some direct connection with interstate commerce, either as part of a crew upon a train engaged in interstate commerce, or about the tracks and switches which were in active use in conducting interstate commerce, but in the case at bar Pedersen was engaged merely in duties tending towards the manufacturing of something which was afterwards to be used in interstate commerce and therefore his connection is entirely too remote to be covered by the act.

It is respectfully submitted that the judgment of the Circuit Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

JAMES F. CAMPBELL,
Attorney for Defendant in Error.

WILLIAM S. JENNEY,
Of Counsel.

PEDERSEN *v.* DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 698. Argued January 14, 1913.—Decided May 26, 1913.

Under the Employers' Liability Act a right of recovery exists only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed in such commerce; but it is not essential that the co-employé causing the injury be also employed in such commerce.

One engaged in the work of maintaining tracks, bridges, engines or cars in proper condition after they have become and during their use as instrumentalities of interstate commerce, is engaged in interstate commerce, and this even if those instrumentalities are used in both interstate and intrastate commerce.

One carrying materials to be used in repairing an instrumentality of interstate commerce is engaged in such commerce; and so *held*, that a railroad employé carrying bolts to be used in repairing an interstate railroad and who was injured by an interstate train is entitled to sue under the Employers' Liability Act of 1908.

A Federal court is without authority to reverse a judgment in favor of one party and direct a judgment in favor of the other *non obstante veredicto*. *Slocum* v. *New York Life Ins. Co.*, 228 U. S. 364.

197 Fed. Rep. 537, reversed.

THE facts, which involve the construction of the Employers' Liability Act of 1908 and the determination of what constitutes being engaged in interstate commerce, are stated in the opinion.

Mr. Benjamin Patterson, with whom *Mr. George Bell* was on the brief, for plaintiff in error.

Mr. James F. Campbell, with whom *Mr. William S. Jenney* was on the brief, for defendant in error:

An attempt is made in this case to stretch to the utmost limit the scope of the Federal Employers' Liability Act as to what employés of a railroad company are entitled to its benefits.

The injured employé had nothing at all to do with transportation, but was merely a helper in and about the building of new bridges or the repair of old ones; he had nothing to do with the operation of trains, the repair or maintenance of track or cars or anything in connection with intercourse between the States.

If this employé comes within the terms of the act then practically every other employé of a railroad does, no matter how remote their services may be in connection with interstate commerce.

One of the chief objections to the act of 1906, which was declared unconstitutional in the *Employers' Liability Cases*, 207 U. S. 463, 498, was that it included employés who were not actually employed in interstate commerce.

There was nothing real or substantial in plaintiff in error's employment in connection with interstate commerce that would include him within the terms of the act. He had nothing whatever to do with operation of trains; nor with anything in connection with intercourse or traffic; nor with tracks, roadbed or the other instrumentalities of commerce. He was a laborer in and about the construction of a new bridge or carrying supplies that were to be used in the repair or remodeling of an old one. The mere fact that he was using the railroad track as a path to go to or from his work certainly would not make him engaged in commerce, or the fact that his carrying bolts or rivets which were to be used in the construction of a railroad bridge, give him any real or substantial connection with interstate commerce, traffic or intercourse.

Commerce is a term of the largest import, *Welton* v. *Missouri*, 91 U. S. 275; *P. & R. R. Co.* v. *Pennsylvania*, 15 Wall.

232; *New York* v. *Miln*, 11 Pet. 102; *Kidd* v. *Pearson*, 128 U. S. 1, 20; Judson on Interstate Commerce, §§ 6, 7; 7 Cyc. 413; but giving the words their proper construction means that the employé must be engaged in commerce; that is, traffic or intercourse between the States, and that an employé not engaged in transportation, traffic or intercourse between the States is not engaged in such commerce. Congress has power under the commerce clause to regulate the instrumentalities of commerce, but if Congress meant to take care of employés not engaged in traffic or commerce, but simply about the instrumentalities of commerce, it would so have said. *Hooper* v. *California*, 155 U. S. 648; *Williams* v. *Fears*, 179 U. S. 270.

The distinction, therefore, is between acts of commerce and subjects of commerce which include anything that may be transported and the instrumentalities thereof. The plaintiff was engaged about some construction work, that is, manufacturing something new, although it is true such creation or result was afterwards to be used as a means whereby interstate commerce was to be carried on. These acts are not such interstate commerce as is contemplated by the statute. *United States* v. *Knight*, 156 U. S. 1; *Int. Com. Comm.* v. *Detroit &c. R. Co.*, 167 U. S. 633; *Penn. R. R.* v. *Knight*, 192 U. S. 21.

If plaintiff in error was engaged in interstate commerce, then the man chopping down trees in the forest in order to make railroad ties is equally employed in interstate commerce, and even the miner working in mines to furnish the railroad with coal, which is to be used on its interstate engines, is so engaged. *Southern Ry. Co.* v. *United States*, 222 U. S. 20, does not apply.

For cases in the Federal courts deciding what employés come under the act, see *Taylor* v. *Southern Ry. Co.*, 178 Fed. Rep. 380; *Johnson* v. *Gt. Nor. Ry. Co.*, 178 Fed. Rep. 643; *Zikos* v. *Oregon Nav. Co.*, 179 Fed. Rep. 893; *Colasurdo* v. *Cent. R. R. of N. J.*, 180 Fed. Rep. 832, aff'd 192

Fed. Rep. 901; *Van Brimmer* v. *Tex. & Pac. Ry. Co.*, 190 Fed. Rep. 394; *Behrens* v. *Ill. Cent. R. R. Co.*, 192 Fed. Rep. 581; *Lamphere* v. *Oregon Nav. Co.*, 196 Fed. Rep. 336; *Bennett* v. *Lehigh Valley R. R. Co.*, 197 Fed. Rep. 578; *Heimbach* v. *Lehigh Valley R. R. Co.*, 197 Fed. Rep. 579; *Feaster* v. *Phila. & Read. Ry. Co.*, 197 Fed. Rep. 580; *Nor. Pac. Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1.

In every one of these cases where a recovery was allowed under the act, the railroad employé had some direct connection with interstate commerce, either as part of a crew upon a train engaged in interstate commerce, or about the tracks and switches which were in active use in conducting interstate commerce, but in the case at bar the employé was engaged merely in duties tending towards the manufacturing of something which was afterwards to be used in interstate commerce and therefore his connection is entirely too remote to be covered by the act.

Mr. Justice Van Devanter delivered the opinion of the court.

This was an action under the Employers' Liability Act [1] of April 22, 1908, 35 Stat. 65, c. 149, to recover for personal injuries sustained by the plaintiff through the negligence of a co-employé while both were in the defendant's service. At the trial the Circuit Court refused to direct a verdict in the defendant's favor, and the jury returned a verdict for the plaintiff, assessing his damages at $6,190. Subsequently the court, following a local statute (Penn. Laws, 1905, p. 286, c. 198), entered judgment for the defendant notwithstanding the verdict, on the ground that the latter was not sustained by the evidence. 184 Fed. Rep. 737. The judgment was affirmed

[1] The act and the amendment of April 5, 1910, are printed in full in 223 U. S., p. 6.

by the Circuit Court of Appeals, 197 Fed. Rep. 537, and the plaintiff sued out this writ of error.

The evidence, in that view of it which must be taken here, was to the following effect: The defendant was operating a railroad for the transportation of passengers and freight in interstate and intrastate commerce, and the plaintiff was an iron worker employed by the defendant in the alteration and repair of some of its bridges and tracks at or near Hoboken, New Jersey. On the afternoon of his injury the plaintiff and another employé, acting under the direction of their foreman, were carrying from a tool car to a bridge, known as the Duffield bridge, some bolts or rivets which were to be used by them that night or very early the next morning in "repairing that bridge," the repair to consist in taking out an existing girder and inserting a new one. The bridge could be reached only by passing over an intervening temporary bridge at James Avenue. These bridges were being regularly used in both interstate and intrastate commerce. While the plaintiff was carrying a sack of bolts or rivets over the James Avenue bridge, on his way to the Duffield bridge, he was run down and injured by an intrastate passenger train, of the approach of which its engineer negligently failed to give any warning.

The Circuit Court ruled that an injury resulting from the negligence of a co-employé engaged in intrastate commerce was not within the terms of the Federal act, and the Circuit Court of Appeals, although disapproving that ruling, held that under the evidence it could not be said that the plaintiff was employed in interstate commerce and therefore he was not entitled to recover under the act.

Considering the terms of the statute, there can be no doubt that a right of recovery thereunder arises only where the injury is suffered while the carrier is engaged in interstate commerce and while the employé is employed by the carrier in such commerce; but it is not essential,

where the causal negligence is that of a co-employé, that he also be employed in such commerce, for, if the other conditions be present, the statute gives a right of recovery for injury or death resulting from the negligence "of *any* of the . . . employés of such carrier," and this includes an employé engaged in intrastate commerce. *Second Employers' Liability Cases*, 223 U. S. 1, 51.

That the defendant was engaged in interstate commerce is conceded, and so we are only concerned with the nature of the work in which the plaintiff was employed at the time of his injury. Among the questions which naturally arise in this connection are these: Was that work being done independently of the interstate commerce in which the defendant was engaged, or was it so closely connected therewith as to be a part of it? Was its performance a matter of indifference so far as that commerce was concerned, or was it in the nature of a duty resting upon the carrier? The answers are obvious. Tracks and bridges are as indispensable to interstate commerce by railroad as are engines and cars, and sound economic reasons unite with settled rules of law in demanding that all of these instrumentalities be kept in repair. The security, expedition and efficiency of the commerce depends in large measure upon this being done. Indeed, the statute now before us proceeds upon the theory that the carrier is charged with the duty of exercising appropriate care to prevent or correct "any defect or insufficiency . . . in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment" used in interstate commerce. But independently of the statute, we are of opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it. The contention to the contrary proceeds upon the assumption that interstate commerce by railroad can

be separated into its several elements and the nature of each determined regardless of its relation to others or to the business as a whole. But this is an erroneous assumption. The true test always is: Is the work in question a part of the interstate commerce in which the carrier is engaged? See *McCall* v. *California*, 136 U. S. 104, 109, 111; *Second Employers' Liability Cases*, *supra*, 6, 59; *Zikos* v. *Oregon R. & Navigation Co.*, 179 Fed. Rep. 893, 897, 898; *Central R. Co. of N. J.* v. *Colasurdo*, 192 Fed. Rep. 901; *Darr* v. *Baltimore & O. R. Co.*, 197 Fed. Rep. 665; *Northern Pacific Ry. Co.* v. *Maerkl*, 198 Fed. Rep. 1. Of course, we are not here concerned with the construction of tracks, bridges, engines or cars which have not as yet become instrumentalities in such commerce, but only with the work of maintaining them in proper condition after they have become such instrumentalities and during their use as such.

True, a track or bridge may be used in both interstate and intrastate commerce, but when it is so used it is none the less an instrumentality of the former; nor does its double use prevent the employment of those who are engaged in its repair or in keeping it in suitable condition for use from being an employment in interstate commerce.

The point is made that the plaintiff was not at the time of his injury engaged in removing the old girder and inserting the new one, but was merely carrying to the place where that work was to be done some of the materials to be used therein. We think there is no merit in this. It was necessary to the repair of the bridge that the materials be at hand, and the act of taking them there was a part of that work. In other words, it was a minor task which was essentially a part of the larger one, as is the case when an engineer takes his engine from the roundhouse to the track on which are the cars he is to haul in interstate commerce. See *Lamphere* v. *Oregon*

R. & Navigation Co., 196 Fed. Rep. 336; *Horton* v. *Oregon, &c. Co.*, 130 Pac. Rep. 897; *Johnson* v. *Southern Pacific Co.*, 196 U. S. 1, 21.

What has been said shows that there was evidence to sustain a finding that at the time of the plaintiff's injury the defendant was engaged, and he was employed by it, in interstate commerce, and, as in other respects the case was one for the jury, the court rightly denied the defendant's request that a verdict in its favor be directed. A motion for a new trial was interposed by the defendant, but no ruling was had upon it, doubtless because the court concluded that it could and should render judgment for the defendant on the evidence notwithstanding the verdict. In this the court was in error, first, because it was without authority so to do (*Slocum* v. *New York Life Insurance Co.*, 228 U. S. 364), and, second, because the evidence did not warrant such a judgment. Unless the motion for a new trial was well taken, judgment should have been given for the plaintiff on the verdict, and, subject to that qualification, the plaintiff is now entitled to such a judgment.

The judgments of the Circuit Court and the Circuit Court of Appeals are reversed, and the case is remanded for further proceedings in accordance with this opinion.

Judgment reversed.

MR. JUSTICE LAMAR with whom concurred MR. JUSTICE HOLMES and MR. JUSTICE LURTON, dissenting:

I am unable to assent to the proposition that a man carrying bolts to be used by him in repairing a railroad bridge was employed in interstate commerce.

Transportation has been defined as commerce, and those engaged in transportation are employed in commerce. But in building the bridge originally the carrier was not "engaging in commerce between the States," and the plaintiff, in subsequently repairing it, was not

employed in such commerce. Such work was not a part of commerce, but an incident which preceded it.

The act provides that "every common carrier by railroad, while engaging in commerce between any of the States or Territories . . . shall be liable in damages to any person suffering injury while employed by such carrier in such commerce."

The defendant, though engaged in both interstate and intrastate commerce was also engaged in many other incidental activities which were not commerce in any sense.

The railroad had to be surveyed and built, bridges had to be constructed and renewed, cars had to be manufactured and repaired, warehouses had to be built and painted, wages had to be paid and books kept; but these transactions, though incident to it were not transportation, and, therefore, not within the purview of the statute limited to persons employed in commerce. Otherwise the law would embrace "all of the activities in any way connected with trade between the States and exclude state control over matters purely domestic in their nature." *Hooper* v. *California*, 155 U. S. 648, 655. Acts burdening interstate commerce can, of course, be prohibited by Congress. But when Congress itself limits the operation of the statute to persons injured while employed in interstate commerce the statute does not extend to its incidents and is confined to transportation. It does not include manufacturing, building, repairing, for they are not commerce, whether performed by a private person, a railroad, or its agents.

It is conceded that a line must be drawn between those employés of the carrier who are employed in commerce and those engaged in other departments of its business. It must be drawn so as to take in on one side those engaged in transportation, which is commerce, otherwise there is no logical reason why it should not include every

agent of the company; for there is no other test by which to determine when he must sue under the state statute and when under the act of Congress; for if a man on his way to repair a bridge is engaged in interstate commerce, then the man in the shop who made the bolts to be used in repairing the bridge is likewise so engaged. If they are, then the man who paid them their wages, and the bookkeeper who entered those payments in the accounts, are similarly engaged. For they are all employed by the carrier, and the work of each contributes to its success in hauling freight and passengers.

This view is supported by the two cognate statutes. The Hours of Service Law applies only to those "engaged in the movement of trains" and the Safety Appliance Law refers, not to machines in the shop, but to cars and locomotives, which are the immediate instruments of transportation. The Employers' Liability Act in like manner applies to those engaged in transportation and not to those employed in building, manufacturing or repairing.

The plaintiff was carrying bolts to be used in repairing a bridge. That was not interstate commerce, and in my opinion the court below properly held that his rights were to be determined by the laws of the State of New Jersey and not by the act of Congress.

MR. JUSTICE HOLMES and MR. JUSTICE LURTON concur in this dissent.